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Supreme Court, U.S.
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In The Supreme Court of the United States

JOHN JAMES McFARLAND,

Petitioner,

v.

DIRK KEMPTHORNE, Secretary of the Interior; SUZANNE LEWIS, Superintendent, Glacier National Park; UNITED STATES OF AMERICA; NATIONAL PARK SERVICE; NATIONAL PARKS CONSERVATION ASSOCIATION,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the common law doctrine of easement implied by necessity applies against the United States and, if so, does an implied, revocable license limited to non-motorized access extinguish such an easement?

2. Whether Congress, in passing the Homestead Act, intended for settlers to have an easement for access to their homesteads?

3. Whether the common law doctrine of easement implied by prior use applies against the United States and, if so, does an implied, revocable license limited to non-motorized access extinguish such an easement?

LIST OF PARTIES AND RULE 29.6 DISCLOSURE

The caption lists all the parties. Petitioner John James McFarland is an individual and not a corporation; therefore, no corporate disclosure statement is required under Supreme Court Rule 29.6.

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PETITION FOR WRIT OF CERTIORARI

John James McFarland hereby petitions this Court for a writ of certiorari to review the opinion of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

Initially, the United States District Court for the District of Montana held that McFarland's claims were barred by the Quiet Title Act's twelve-year limitations period and dismissed McFarland's suit. *McFarland v. Norton*, No. 00-20, slip op. (D.Mont. July 9, 2003) (App.53); *see* 28 U.S.C. § 2409a. On appeal, however, the Ninth Circuit reversed and remanded the case to the District Court for a decision on the merits. *McFarland v. Norton*, 425 F.3d 724 (9th Cir. 2005) (App.41).

On remand, the District Court granted summary judgment for the National Park Service,[1] holding that McFarland did not possess an easement over Glacier Route 7 to access his home, which is surrounded by Glacier National Park, and that the Park Service's denial of McFarland's special use permit application was not arbitrary or capricious. *McFarland v. Kempthorne*, 464 F.Supp.2d 1014 (D.Mont. 2006) (App.15).

[1] Respondents are referred to collectively as the "Park Service" throughout this Petition.

McFarland appealed and the Ninth Circuit affirmed the District Court's decision. *McFarland v. Kempthorne*, 545 F.3d 1106 (9th Cir. 2008) (App.1).

JURISDICTION

The District Court had jurisdiction over McFarland's claims pursuant to 28 U.S.C. § 1346(f) and 28 U.S.C. § 1331. The Ninth Circuit had jurisdiction to review the District Court's final judgment pursuant to 28 U.S.C. § 1291. Pursuant to Supreme Court Rule 13.3, this Petition is timely filed within 90 days of the Ninth Circuit's judgment. Pursuant to 28 U.S.C. § 1254(1), this Court has jurisdiction to review the judgment of the Ninth Circuit.

STATUTORY PROVISION INVOLVED

The Homestead Act of 1862 provides, in pertinent part:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That any person who is the head of a family, or who has arrived at the age of twenty-one years, and is a citizen of the United States, or who shall have filed his declaration of intention to become such, as required by the naturalization laws of the United States, and who has never borne arms against the United States

Government or given aid and comfort to its enemies, shall, from and after the first of January, eighteen hundred and sixty-three, be entitled to enter one quarter section or a less quantity of unappropriated public lands, upon which said person may have filed a preemption claim, or which may, at the time the application is made, be subject to preemption at one dollar and twenty-five cents, or less, per acre; or eighty acres or less of such unappropriated lands, at two dollars and fifty cents per acre, to be located in a body, in conformity to the legal subdivisions of the public lands, and after the same shall be surveyed . . .

* * *

. . . *And be it further enacted*, That the person applying for the benefit of this act shall, upon application to the register of the land office in which he or she is about to make such entry, make affidavit before the said register or receiver that he or she is the head of a family, or is twenty-one years or more of age, or shall have performed service in the army or navy of the United States, and that he has never borne arms against the Government of the United States or given aid and comfort to its enemies, and that such application is made for his or her exclusive use and benefit, and that said entry is made for the purpose of actual settlement and cultivation, and not either directly or indirectly for the use or benefit of any other person or persons whomsoever; and upon filling the

> said affidavit with the register or receiver, and on payment of ten dollars, he or she shall thereupon be permitted to enter the quantity of land specified: *Provided, however*, That no certificate shall be given or patent issued therefore until the expiration of five years from the date of such entry . . .
>
> * * *

12 Stat. 392 (1862), *repealed by* Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1701-1785.

STATEMENT OF THE CASE

"[B]etween 1901 and 1910, the Valley of the North Fork of the Flathead River seemed on the verge of economic development. Speculation abounded regarding the extraction of oil, coal, and timber, and the area seemed well-suited for fishing and hunting parties." Alan S. Newell, *et al.*, *Historic Resources Study, Glacier National Park and Historic Structures Survey* (Aug. 1980) (App.63, 67). In July 1909, McFarland's predecessor-in-interest, Charles Schoenberger, settled his family along the North Fork of the Flathead River. Pursuant to the Homestead Act of 1862,[2] Schoenberger staked his homestead claim and established his residence. App.3, 67 ("These early

[2] 12 Stat. 392 (1862), *repealed by* Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1701-1785.

claims [entered between 1901 and 1910] tended to lie east of the North Fork, because of the road access [Glacier Route 7] and the location of large meadows on this side of the river. Indicative of this type of settlement [is] . . . the Schoenberger . . . place[ ] on Big Prairie."). In 1914, Schoenberger provided final proof of his homestead claim and, in 1916, was issued a land patent by President Woodrow Wilson. *Id.*; Patricia Bick, *Homesteading on the North Fork in Glacier National Park* (Oct. 1986) (App.72). In 1983, McFarland acquired the Schoenberger homestead from his grandmother, Mary.[3] Memorandum from Scott Emmerich to Charlie Logan (Sept. 23, 1998) (App.92). McFarland's property consists of approximately 2.75 acres located entirely within the boundaries of Glacier National Park. App.3. Several structures have been built upon McFarland's property, including a fully appointed, 40 x 40 foot, two-story home, a 24 x 36 foot, two-story garage with an upstairs apartment, and a 20 x 30 foot, single-story guest cabin. Letter from Jack McFarland to Steve Frye (Sept. 24, 1999) (App.98-100).

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[3] The McFarland family has long resided within the "Big Prairie" region of what is now Glacier National Park. By 1945, McFarland's great-grandfather had purchased approximately 480 acres of land in Big Prairie, which was operated as the Quarter Circle MC Ranch until 1967, when the Park Service condemned it via an eminent domain proceeding. App.76, 82, 85. After the condemnation, Mary McFarland purchased a portion of the Schoenberger homestead to remain in Big Prairie. Memorandum from Scott Emmerich to Charlie Logan (Sept. 23, 1998) (App.92).

Overland access to McFarland's home is now, and has always been, over Glacier Route 7. App.3. Glacier Route 7 generally runs north and south adjacent to McFarland's home; it was constructed in 1901 by the Butte Oil Company to provide access to a mining claim north of McFarland's home. App.16-17; App.66 ("This wagon-trail [Glacier Route 7] . . . quickly proved an access route for adventurous homesteaders."). Today, Glacier Route 7 extends nearly to the Canadian border, approximately 15 miles north of McFarland's home, and to the Village of Apgar, approximately 30 miles to the south. App.16-17. A spur road branches from Glacier Route 7 approximately three miles south of McFarland's home and exits Glacier National Park at the Polebridge Ranger Station. App.17.

Until the 1950s, the Park Service maintained Glacier Route 7 north of the Polebridge Ranger Station throughout the winter, including removing snow when necessary. App.43-44. For a time thereafter, residents of the Big Prairie area cooperated to plow the road themselves. *Id.* Indeed, although the Park Service has maintained a gate of sorts across Glacier Route 7 at the Polebridge Ranger Station since the 1970s, the Park Service had continued to allow inholders motorized access to their properties in the winter. App.44. In fact, the Park Service continued to allow inholders some degree of motorized access over Glacier Route 7 until the winter of 1999. App.3. In December 1999, however, the Park Service notified McFarland that it would no longer allow

inholders motorized access once Glacier Route 7 was closed to the general public. *Id.* As a result, the 3.2-mile portion of Glacier Route 7 between the Polebridge Ranger Station and McFarland's home is closed by Park Service order for five months each year, from December 1 through May 1. App.17.

It is undisputed that McFarland's home and the surrounding property were once owned by the United States, and that that unity of title was severed when McFarland's property was patented. App.22; App.64 ("With the opening of the valley to legal homesteading in 1906, the 'Flathead River Road' [Glacier Route 7] would provide access to venturesome subsistence settlers – an access situate completely within the subsequent boundaries of the Glacier National Park."). Further, McFarland's property is completely land-locked, and, by necessity, he must cross lands of the grantor, *i.e.*, the United States, in order to access his home. App.3. Moreover, Glacier Route 7 is not subject to a public road easement nor are statutory rights of access granted to McFarland under federal laws such as the Alaska National Interest Lands Conservation Act, 16 U.S.C. § 3210(a). *Cf. Fitzgerald Living Trust v. United States*, 460 F.3d 1259, 1266-1267 (9th Cir. 2006) (holding no easement implied by necessity because of the statutory grant of access in ANILCA).

Prior to the Park Service's 1999 road closure decision, McFarland had advised the Park Service that he intended to reside on his property year-round with his wife and three children. App.44. After being

informed that he could not access his home by motorized means during the winter, on January 6, 2000, McFarland filed an application for a special use permit seeking permission to drive a motor vehicle between his home and the Polebridge Ranger Station during the seasonal road closure and, if the road were impassable by passenger vehicle, to use a snowmobile for the exclusive purpose of accessing his home. App.4. The Park Service denied McFarland's permit application, and McFarland appealed the denial to the Deputy Regional Director of the Park Service, who affirmed the denial on April 21, 2000. App.4-5.

Following the denial of his special use permit application, McFarland initiated the instant suit against the Park Service, seeking to quiet title to an easement over Glacier Route 7 pursuant to the Quiet Title Act, 28 U.S.C. § 2409a.[4] App.5. Among other claims, McFarland claimed a right of access pursuant to the common law doctrines of implied easement and easement implied by necessity. *Id.* Initially, the District Court held McFarland's claims were barred by the Quiet Title Act's twelve-year limitations period and dismissed McFarland's suit. App.61-62. On appeal, however, the Ninth Circuit reversed and

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[4] Although not at issue in this Petition, McFarland also sought judicial review of the denial of his special use permit application. App.5. Ultimately, the Ninth Circuit held that the Park Service's denial of McFarland's permit application was not arbitrary or capricious. *Id.*

remanded the case to the District Court for a decision on the merits. App.52.

On remand, the District Court granted summary judgment in favor of the Park Service, holding that the permissive access provided to McFarland, *i.e.*, that he could use motorized means to access his home seven months of the year and walk, ski, or snowshoe during the remaining five winter months, defeated his claim for an easement implied by necessity. App.28. The District Court also denied McFarland's claim to an easement implied by prior use. App.29-30. On appeal, the Ninth Circuit affirmed the District Court's order, holding that "even subject to the seasonal limitations imposed by the Park Service, and in spite of the associated inconvenience, McFarland enjoys sufficient access to his property to defeat a finding of easement by necessity." App.9. The Ninth Circuit further held that the doctrine of easement implied by prior use was not appropriate in cases where title was acquired by public grant. App.11.

REASONS FOR GRANTING THE PETITION

I. THIS COURT SHOULD GRANT THE PETITION TO ESTABLISH THAT THE COMMON LAW DOCTRINE OF EASEMENT IMPLIED BY NECESSITY APPLIES AGAINST THE UNITED STATES AND PROVIDES AN INHOLDER ACCESS RIGHTS TO HIS PROPERTY.

A. The Doctrine Of Easement Implied By Necessity Was Developed To Provide Access To Landlocked Property Owners And Protect The Use And Enjoyment Of Their Property.

An easement implied by necessity is an equitable remedy derived from a common law doctrine, traceable at least as far as the 13th century and the courts of Edward I, which states that anyone who grants a thing to someone is understood to grant that without which the thing cannot be or exist. Restatement (Third) of Property (Servitudes) § 2.15, cmt. a. This presumption is still a basis for an easement implied by necessity. *Id.* Later determinations also rest upon the theory that public policy favors the full and productive utilization of land. *Id.*; Hunter C. Carroll, *Property – Easements By Necessity: What Level of Necessity is Required?* 19 Am. J. Trial Advoc. 475, 475-476 (1995). Both justifications for an easement implied by necessity have force. The presumed intent of the parties justifies finding that the conveyance includes rights necessary to avoid rendering the property useless, as the parties to a conveyance

would rarely, if ever, intend such a result. Restatement (Third) of Property (Servitudes) § 2.15, cmt. a. Moreover, public policy justifies the rule because it avoids the costs involved if the property were deprived of rights necessary to make it useable, "whether the results is that it remains unused, or that the owner incurs the costs of acquiring rights from landowners who are in a position to demand an extortionate price because of their monopolistic position." *Id.* Regardless of the rationale employed, the common law doctrine of easement by necessity is firmly rooted in American jurisprudence and remains a vital protection of the right of access enabling the use and enjoyment of landlocked property. *See id.* § 2.15 (discussing the development of common law easement implied by necessity and its continued application); *see also* Hunter, 19 Am. J. Trial Advoc. at 475-477; *Snyder v. Warford*, 11 Mo. 513 (1848). Indeed, the right of access is the very essence of property ownership, *Curtin v. Benson*, 222 U.S. 78, 86 (1911), for, without access, land is worthless.

B. An Easement Implied By Necessity Will Be Created When There Was Unity Of Title, Severance Of That Unity, And Strict Necessity.

An easement implied by necessity is created when: (1) the title to two parcels of land was held by a single owner; (2) the unity of title was severed by a conveyance of one of the parcels; and (3) at the time of severance, the easement was necessary for the owner

of the severed parcel to use his property. Restatement (Third) of Property (Servitudes) § 2.15; 25 Am.Jur.2d Easements and Licenses § 30; *see also Schmid v. McDowell*, 649 P.2d 431, 433 (Mont. 1982) ("Where an owner of land conveys a parcel thereof which has no outlet to a highway except over the remaining lands of the grantor or over the lands of strangers, a way of necessity exists over the remaining lands of the grantor.").

At common law, the various jurisdictions utilize two distinct variations on the level of necessity required to imply an easement. Under the majority view, an easement implied by necessity may exist over the grantor's land for the reasonable convenience of the grantee, even though other access may be available. Carroll, 19 Am. J. Trial Advoc. at 476. This view is termed "reasonable necessity" and is not the rule in federal courts. Under the minority view, an easement implied by necessity can be created only when physical necessity exists, *i.e.*, only when the route of access geographically crosses the lands of the grantor. This is termed "strict necessity" and is the standard apparently adopted by federal courts. *United States v. Jenks*, 129 F.3d 1348, 1353-1354 (10th Cir. 1997); *Mackie v. United States*, 194 F.Supp. 308 (D.Minn. 1961); *see also Graham v. Mack*, 699 P.2d 590 (Mont. 1985). Strict necessity, of course, is the narrower interpretation, finding necessity only when physically, geographically necessary. In contrast, reasonable necessity may be implied for the

convenience of the grantee, despite that physical necessity may not exist.

C. An Easement Implied By Necessity Stems From The Route Of Access, Not The Mode Of Access.

Unfortunately, courts have confused the strict necessity standard, which is perhaps somewhat justified, as both courts and commentators are frequently loose with the language of necessity. *See Jenks*, 129 F.3d at 1353-1354; *Fitzgerald*, 460 F.3d at 1266-1267; *see also* App.9; Carroll, 19 Am. J. Trial Advoc. at 476; James W. Simonton, *Ways By Necessity*, 25 Colum. L. Rev. 571 (1925) (discussing the origins of easements by necessity and the confusion by the courts in applying the test for necessity). Even the authors of *American Jurisprudence* use loose language when discussing necessity: "[a] *way* of necessity will not be implied if the claimant has another *mode* of access to his or her land, either by another *way* over his or her land or by a *right-of-way* over the land of another." 25 Am.Jur.2d Easements § 37 (all emphasis added); *see* Black's Law Dictionary 1003, 1593 (6th ed. 1990) (defining "mode" as "The manner in which a thing is done" and defining "way" as "A passage, path, road, or street."). Despite confusing the "route" at issue with the "mode" of utilizing that route, the cases cited by *American Jurisprudence* uniformly and clearly discuss the route, not the mode of travel. 25 Am.Jur.2d Easements § 37, n.2 (citing *Carr v. Turner*, 575 So.2d 1066, 1067 (Ala. 1991);

Kennedy v. Papp, 741 S.W.2d 625, 628 (Ark. 1987); *O'Connell v. Larkin*, 532 A.2d 1039, 1042 (Me. 1987); *Jowers v. Hornsby*, 357 S.E.2d 710, 711 (S.C. 1987); *Am. Small Business Inv. Co. v. Frenzel*, 383 S.E.2d 731 (Va. 1989) (although this case found no unity of title, it is clear that the route of access was at issue)).

Therefore, the "necessity" required for an easement implied by necessity does not stem from the *mode of access*; instead, it is derived from the *geography of the route of access*. 25 Am.Jur.2d Easements § 37; *Schmid*, 649 P.2d at 433. That is, if the grantee must cross the land of the grantor, regardless of the mode of transportation, "strict necessity" exists sufficient to support an easement. *Id.* It is only after an easement has been recognized that courts may move to the question of what modes of access are reasonable. In this case, neither the District Court nor the Ninth Circuit recognized this critical distinction.

In this case, the District Court stated, "In sum, McFarland does not possess an easement by necessity over Glacier Route 7 because he has an alternative *route of access* to the Property. McFarland can *walk, ski, snowshoe, or ride on horseback* along Glacier Route 7 to reach the Property." App.28 (both emphasis added). Thus, the District Court begins by finding that McFarland has an alternative "*route of access*," yet bases this conclusion not on a finding that "an alternative route of access" exists but instead on its view of an alternative *mode of travel*: "ski[ing], snowshoe[ing], or rid[ing] on horseback." *Id.* Likewise, the

Ninth Circuit held, "necessity may be defeated by alternative *routes* or *modes* of access – no matter how inconvenient." App.9 (both emphasis added) (erroneously equating a route of access with a mode of travel). This is not the first time the Ninth Circuit has been confused on this issue. *See Fitzgerald*, 460 F.3d at 1266-1267. In this case, the confusion of both the District Court and the Ninth Circuit is apparent.

As a result of its confusion as to what the law requires, the Ninth Circuit, in a very circular fashion, held that, because there is an alternative *mode* of access, *i.e.*, by foot, there is no strict necessity; therefore, because there is no necessity, there is no easement. App.9. The correct analysis, however, is instead: because there is no alternative *route* of access that does not cross the grantor's land, there is strict necessity; therefore, because there is necessity, an easement exists. It is only after the later finding that the Ninth Circuit should have considered whether the Park Service's obstruction of McFarland's easement is permissible or whether it places an impermissible interference upon McFarland's estate. By circumventing the threshold question, the Ninth Circuit reached a conclusion unsupported by the law of easements.

In holding that McFarland had to show more than mere inconvenience to prove necessity, the Ninth Circuit relied erroneously upon *Mackie v. United States*. App.9. In *Mackie*, the alternative route of access Mackie desired would not have lead directly to his property; instead, it was one he sought only for his convenience. In fact, regardless of the *route*, the

mode of travel that Mackie would use was identical: under either route, Mackie would use a canoe to access his property. *Mackie*, 194 F.Supp. at 306-308. Thus, the district court held correctly that Mackie's proposed route was not strictly necessary to access his property, *i.e.*, it was not a strict necessity that Mackie physically cross the lands of the grantor.[5] *Id.* at 308. Accordingly, the district court held that "one cannot claim an easement by way of necessity over lands to which he has another mode of access, however inconvenient." *Id.* (This court also used loose language, mixing a mode of access with a route of access; the mode of access under Mackie's existing and proposed routes was, in fact, identical – it was only the route that would have changed.). Thus, because the court was discussing the inconvenience of the route of access, and because there was no strict necessity, *Mackie* is a "reasonable necessity" case. The Ninth Circuit's reliance on *Mackie* is misplaced; its misstatement of the law is clear.

This Court should grant the Petition to establish that an alternate mode of travel does not defeat the

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[5] Further, that the Mackie property was located in Minnesota provides some insight. In Minnesota, necessity may be defeated by access via a navigable waterway. *In re Daniel*, 656 N.W.2d 543, 545-546 (Minn. 2003). This Court has not yet addressed whether access via a navigable waterway will defeat necessity; however, the modern rule is that it does not. E. L. Kellett, Annotation, *Easements: Way by Necessity Where Property is Accessible by Navigable Water*, 9 A.L.R.3d 600 (1966 & cum. supp.).

necessity and, thus, the easement implied by necessity. The easement is only defeated by an alternative route of access.

D. The Doctrine Of Easement Implied By Necessity Applies Against The Federal Government.

It has been suggested that sovereign immunity exempts the federal government from easements implied by necessity; however, an easement implied by necessity may lie against the federal government. App.8; *Fitzgerald*, 460 F.3d at 1266; *Mont. Wilderness Ass'n v. United States Forest Serv.*, 496 F.Supp. 880, 885 (D.Mont. 1980), *aff'd on other grounds*, 655 F.2d 951 (9th Cir. 1981); *see Jenks*, 129 F.3d at 1353; *United States v. Dunn*, 478 F.2d 443 (9th Cir. 1973); *Snyder v. Warford*, 11 Mo. 513 (1848); *see also* Marjorie Dick Rombauer, Comment, *Easements By Way of Necessity Across Federal Lands*, 35 Wash. L. Rev. 105, 112 (1960); Simonton, 25 Colum. L. Rev. at 579. Unfortunately, federal courts that have held correctly that the doctrine applies against the federal government have failed to give their holdings any effect. App.8-9; *Fitzgerald*, 460 F.3d at 1266-1267; *Jenks*, 129 F.3d at 1353-1354. Instead, they have provided mere lip service, rejecting the strict necessity of the claimant in favor of the United States at every turn. *Id.*

That the doctrine applies against the federal government must be given effect. "An easement

creates a nonposssessory right to enter and use land in the possession of another and obligates the possessor [servient estate holder] not to interfere with the uses authorized by the easement." Restatement (Third) of Property (Servitudes) § 1.2. When the federal government enters into agreements to grant land to private individuals, it steps down as sovereign and acts in the same capacity as any other person. *Camfield v. United States*, 167 U.S. 518, 524 (1897); Galen G. B. Schuler, Comment, *Easements By Necessity: A Threshold for Inholder Access Rights Under the Alaska National Interest Lands Conservation Act*, 70 Wash. L. Rev. 307, 316-317 (1995). This Court has held: "[T]he government has, with respect to its own lands, the rights of an ordinary proprietor, to maintain its possession and to prosecute trespassers. It may deal with such lands precisely as a private individual may deal with his farming property." *Camfield*, 167 U.S. at 524. Thus, when the federal government grants lands that become inholdings, it is subject to the common law for interpretation of its conveyances. *United States v. Oregon*, 295 U.S. 1, 27 (1935); *Oklahoma v. Texas*, 258 U.S. 574, 595 (1922). In such cases, the federal government stands in no different position than any other proprietor of land burdened by an easement: It may not interfere with the dominant estate owner's use. App.49.

Likewise, in this case, the Ninth Circuit, although giving lip service to the fact that the doctrine of easement implied by necessity applies against the United States, rendered the holding a nullity by

ruling that no necessity exists. The facts here demonstrate, however, that the strict necessity standard is met. In fact, although the Glacier Act[6] and the National Park Service Organic Act,[7] and their implementing regulations, arguably may permit the Park Service to regulate the general public's access rights, *see United States v. Vogler*, 859 F.2d 638 (9th Cir. 1988), McFarland, as an easement holder, stands in a different position than that of the general public. He has protected rights that may not be unduly interfered with. Here, the Park Service closes Glacier Route 7, through the use of a locked gate, for approximately five months of the year. App.17. During this time, McFarland is prevented from accessing his home by vehicle, despite that "the holder of an easement . . . is entitled to use the servient estate in a manner that is reasonably necessary for the convenient enjoyment of the servitude." Restatement (Third) of Property (Servitudes) § 4.10. This interference with McFarland's use of Glacier Route 7 violates the law of easements and should not be permitted to stand. If there is a case in which an easement implied by necessity exists and should be applied against the United States, it is this one. This Court should grant the Petition to establish that the doctrine applies against the United States.

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[6] 36 Stat. 354.

[7] 16 U.S.C. §§ 1-18f.

II. THIS COURT SHOULD GRANT THE PETITION TO CLARIFY THAT, IN ENACTING THE HOMESTEAD ACT, CONGRESS INTENDED TO CONVEY AN EASEMENT TO SETTLERS TO ACCESS THEIR HOMESTEADS.

This Court has held that federal land grants "are not to be so construed as to defeat the intent of [Congress], or to withhold what is given, either expressly or by necessary or fair implication." *United States v. Denver & Rio Grande Ry. Co.*, 150 U.S. 1, 14 (1893). Based upon this principle, courts have concluded that an easement for access may be implied from the terms of a federal land grant if Congress intended to grant an easement for access. *Kinscherff v. United States*, 586 F.2d 159, 161 (10th Cir. 1978) ("[A]n implied easement may arise within the scope of the patent."); *Mont. Wilderness Ass'n*, 496 F.Supp. at 882 (Congress intended to grant an implied easement for access under railroad land grant statute); *Utah v. Andrus*, 486 F.Supp. 995, 1002 (D.Utah 1979) (Congress intended to grant an implied easement for access to state school trust lands); *see also* 43 Op. Att'y Gen. No. 26 at 2 (June 23, 1980) (concluding that an implied easement for access may arise under federal land grants).

To determine whether Congress intended to grant an implied easement for access under a particular land grant statute, a court must first look to the words of the statute and the statute's legislative history. *See Mont. Wilderness Ass'n*, 496 F.Supp. at

886. If the statute and legislative history are ambiguous, a court should look to the "condition of the country at the time of the grant, as well as the declared purpose of the grant." *Id.*

Although the language of the Homestead Act did not expressly grant an easement for access to homesteads, such an easement can be implied from the language of the Act. The Homestead Act granted persons the right "to *enter* upon . . . unappropriated public lands" to establish homesteads. 12 Stat. 392 (1862), *repealed by* Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1701-1785 (emphasis added). At the time of the Homestead Act, the United States owned nearly all of the land in the West. Thus, an easement for access across surrounding lands of the United States must be necessarily implied in the grant of the right to enter. *Cf. Right of Mining Claimants to Access Over Public Lands to Their Claims*, Solicitor's Opinion, 66 I.D. 361, 363 (1959) (because the mining law grants the right to enter unappropriated lands to explore for minerals, an easement for access for the acceptance of this invitation is necessarily implied); *accord United States v. 9,947.71 Acres of Land*, 220 F.Supp. 328, 331 (D.Nev. 1963); *Alfred E. Koenig*, 4 IBLA 18, 19-20 (1971). Therefore, the language of the Homestead Act supports the conclusion that Congress intended to grant an implied easement for access to lands patented under the Act.

Moreover, a review of the condition of the United States when the Homestead Act was passed, as well

as the declared purposes of the Act, confirms that this was indeed Congress's intention. In the mid-nineteenth century vast amounts of the West remained a largely untapped resource almost exclusively owned by the federal government. Paul W. Gates, *History of Public Land Law Development*, 386-435 (1968). The federal government was viewed as a temporary title holder that would convey its lands into private ownership because settlement and cultivation of the West would strengthen the nation and, thus, benefit all Americans. *Id.* It was against this background that the Homestead Act was enacted. *Id.*

The Homestead Act:

> [P]rescribed the conditions under which citizens could acquire unappropriated public lands in tracts of not exceeding 160 acres. A manifest purpose was to induce settlement upon and cultivation of these lands by those who, five years after proper entry, would become owners in fee through issuance of patents. The great end in view was to convert waste places into permanent homes. Such occupancy and use constituted a most important consideration and were rightly expected to yield larger public benefits than the small required payment of one dollar and a quarter per acre.

Ruddy v. Rossi, 248 U.S. 104, 105 (1918). Thus, in passing the Homestead Act, Congress intended to induce Americans to settle and cultivate lands in the West. *Cf. Mont. Wilderness Ass'n*, 496 F.Supp. at 882

(1864 railroad land grant statute was "the outgrowth of a tremendous desire on behalf of the federal government that the West be settled").

Congress's intent would be frustrated, however, if grantees under the Homestead Act did not have the right to cross the retained lands of the United States to access their homesteads. Congress knew that, in order for settlers to enter upon lands to establish their homesteads, they would have to cross lands of the United States. *Cf. 9,947.71 Acres of Land*, 220 F.Supp. at 331 (Congress knew that in order for miners to access their claims, they would have to cross lands of the United States.). Moreover, no settler would expend the time and effort to settle and cultivate the land if an easement for access was not granted because the right of access is the very essence of land ownership and, without a right of access, the granted lands would have been worthless. *Curtin*, 222 U.S. at 86; *Mont. Wilderness Ass'n*, 496 F.Supp. at 885-886. Thus, the purpose behind Congress's enactment of the Homestead Act would have been defeated had not Congress intended to grant settlers an easement for access. Therefore, it must be that Congress intended to grant an easement for access along with the land granted under the Homestead Act. *Cf. Mont. Wilderness Ass'n*, 496 F.Supp. at 885-886 (Congress intended to grant an easement for

access along with the land granted under the 1864 railroad land grant statute).[8]

In *Denver & Rio Grande Co.*, this Court held that a railroad land grant act implicitly granted the railroad the right to take timber from along its right-of-way for the construction of the facilities because such facilities were necessary and essential for the railroad's operation. 150 U.S. at 15. Specifically:

> It is undoubtedly . . . the well-settled rule of this court that public grants are construed strictly against the grantees; but they are not to be so construed as to defeat the intent of the legislature, or to withhold what is given, either expressly or by necessary or fair implication.
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[8] Furthermore, under the common law, it is presumed that a grantor of property intended to include in the conveyance everything necessary for the beneficial use and enjoyment of the land. *Mackie*, 194 F.Supp. at 308. There is no evidence that Congress intended, with the Homestead Act, to preempt this well-established common law principle. *United States v. Texas*, 507 U.S. 529, 534 (1993) ("[s]tatutes which invade the common law . . . are to be read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident") (alteration in original, internal quotation marks omitted) (quoting *Isbrandtsen Co. v. Johnson*, 343 U.S. 779, 783 (1952)). Thus, it must be presumed that Congress intended to convey to settlers everything necessary for the beneficial use and enjoyment of their homesteads, including easements for access.

> When an act, operating as a general law, and manifesting clearly the intention of congress to secure public advantages, or to subserve the public interests and welfare by means of benefits more or less valuable, offers to individuals . . . as an inducement to undertake and accomplish great and expensive enterprises or works of a quasi public character in or through an immense and undeveloped public domain, such legislation stands upon a somewhat different footing from merly [sic] a private grant, and should receive at the hands of the court a more liberal construction in favor of the purposes for which it was enacted.

Id. at 14. These principles were reaffirmed in *Leo Sheep Co. v. United States*, 440 U.S. 668, 682-683 (1979).

Likewise, Congress's intent behind the Homestead Act was to "undertake and accomplish great and expensive enterprises or works of quasi public character in or through an immense and undeveloped public domain," *i.e.*, to induce Americans to settle and cultivate the West. Thus, this Court should give the Homestead Act a liberal construction[9] because without

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[9] Congress's intent when it enacted the Homestead Act was identical to its intent when it enacted the railroad land grant statutes, *i.e.*, to induce Americans to settle and cultivate the West. *Mont. Wilderness Ass'n*, 496 F.Supp. at 882-886. Thus, because railroad land grant statutes receive liberal constrictions, *see Leo Sheep Co.*, 440 U.S. at 682-683, so must the Homestead Act. Moreover, "[i]t is Hornbook law that the mining

(Continued on following page)

a right of access the granted lands would have been worthless. *Cf. Mont. Wilderness Ass'n*, 496 F.Supp. at 885-886; *9,947.71 Acres of Land,* 220 F.Supp. at 331 (A land grant without right to "maintain and use" a road is "a delusion and a cruel and empty vision.").

III. THIS COURT SHOULD GRANT THE PETITION TO ESTABLISH THAT THE COMMON LAW DOCTRINE OF EASEMENT IMPLIED BY PRIOR USE PROVIDES AN INHOLDER ACCESS RIGHTS OVER ESTABLISHED RIGHTS-OF-WAY IN EXISTENCE AT THE TIME OF THE GRANT.

A. The Doctrine Of Easement Implied By Prior Use Was Developed To Provide Access To Landlocked Property Owners And Protect The Use And Enjoyment Of Their Property.

Easements created by implication arise as an inference of the intention of the parties to a conveyance of land. Restatement (Third) or Property (Servitudes) § 2.12, cmt. a. This inference, which is drawn from the circumstances surrounding the conveyance, represents an attempt to ascribe an intention to parties who had not thought or had not bothered to put the intention into words, or to parties who actually had formed no intention conscious to themselves.

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laws of the United States should be liberally construed." *9,947.71 Acres of Land*, 220 F.Supp. at 331. If the mining laws are liberally construed, so should the Homestead Act.

Id. (an easement implied by prior use furthers the policy of protecting the reasonable expectations, as well as the actual intent, of the parties). To fill these common gaps resulting in incomplete thought, courts find particular facts suggestive of intent on the part of the parties to a conveyance. In the case of an easement implied from prior use, proof of the prior use is evidence that the parties probably intended an easement, on the presumption that the grantor and the grantee would have intended to continue an important or necessary use of the land known to them that was apparently continuous and permanent in its nature. *Id.* § 2.12.

Easements implied by prior use also promote the efficient use of resources by avoiding the unnecessary costs that would be involved in duplicating existing facilities or infrastructure. *Id.* § 2.12, cmt. a. In cases such as McFarland's, an easement implied by prior use is particularly useful. This type of easement avoids the hardship on all parties associated with the construction of a new route of access where one already exists while maintaining and protecting the inholder's right of access.

B. An Easement Implied By Prior Use Will Be Created Where There Is A Preexisting Use Of A Right-Of-Way That Was Intended To Be Permanent And The Easement Is Necessary For The Beneficial Enjoyment Of The Land Granted.

Because inholders such as McFarland claim easements over lands owned by the United States, and no federal statute makes state or local law controlling, federal common law governs an inholder's claim to an easement implied by prior use. *Superior Oil Co. v. United States*, 353 F.2d 34, 37 n.4 (9th Cir. 1965). Little federal common law developed under facts such as those presented here, however, and state law may prove instructive. *United States v. Standard Oil Co.*, 332 U.S. 301, 309-310 (1947); *D'Oench, Duhme & Co. v. Federal Deposit Ins. Corp.*, 315 U.S. 447, 473-75 (1942) (Jackson, J., concurring); *see also* Restatement (Second) of Conflict of Laws § 226 ("Whether there has been a transfer of an interest in land by operation of law and the nature of the interest transferred are determined by the law that would be applied by the courts of the situs."). Indeed, "[a] federal court applying federal common law will often simply incorporate, adopt, or borrow the relevant state-law rule, unless there is a significant conflict between the state rule and a federal interest or federal policy." 32 Am.Jur.2d Federal Courts § 377. *D'Oench*, 315 U.S. at 473-74 (Jackson, J., concurring).

Moreover, this Court has held that "property conveyed by the government will be determined by the States, subject to the condition that their rules do not impair the efficacy of the grants or the use and enjoyment of the property by the grantee." *Packer v. Bird*, 137 U.S. 661, 669 (1891); *United States v. Oregon*, 295 U.S. 1, 27 (1935) ("If [the United States's] intention be not otherwise shown, it will be taken to have assented that its conveyance should be construed and given effect in this particular according to the law of the state in which the land lies." (quoting *Oklahoma v. Texas*, 258 U.S. 574, 595 (1922)); *see Porter v. Samuel*, 889 F.Supp. 213, 219 (D.V.I. 1995) ("Although the Quiet Title Act must be construed according to Federal law, courts may look to state law as an aid in determining the application of statutory language to specific facts." (citing *Amoco Prod. Co. v. United States*, 619 F.2d 1383, 1387 (10th Cir. 1980)). Thus, this Court should look to state law as the basis upon which to build federal common law rules governing this dispute.[10]

State law is particularly instructive in this case because no federal common law has developed regarding easements implied under facts such as those presented here. *See Standard Oil*, 332 U.S. at 309-310

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[10] Federal courts routinely have utilized state common law principles to interpret federal statutes granting access. *See* Schuler, 70 Wash. L. Rev. at 319-320 (discussing and citing examples of federal courts looking to state common law to aid in interpreting inholder's access rights).

("[S]tate law may furnish convenient solutions in no way inconsistent with adequate protection of the federal interest."); *D'Oench*, 315 U.S. at 473-475; *see also* Restatement (Second) of Conflict of Laws § 226 ("nature of the interest transferred [is] determined by the law that would be applied by the courts of the situs"). For example, in Montana, an implied easement exists where: (1) there was a separation of title, (2) there was a use before the separation took place that was so long and so obvious or manifest as to show that it was meant to be permanent, and (3) an easement is necessary for the beneficial enjoyment of the land granted or retained. *Albert G. Hoyem Trust v. Galt*, 968 P.2d 1135, 1139 (Mont. 1998); *Graham*, 699 P.2d at 596 (citing 2 Thompson on Real Property § 351 (1980)). The *Restatement (Third) of Property* suggests a similar approach to that adopted by Montana and suggests looking to the following factors to establish that the parties had reasonable grounds to expect that the conveyance would not terminate the right to continue the prior use:

> (1) the prior use was not merely temporary or casual, and (2) continuance of the prior use was reasonably necessary to enjoyment of the parcel, estate, or interest previously benefited by the use, and (3) existence of the prior use was apparent or known to the parties, or (4) the prior use was for underground utilities serving either parcel.

Restatement (Third) of Property (Servitudes) § 2.12.

That an implied easement exists as to an inholder's property is further strengthened by the policy underlying the Homestead Act. With the Homestead Act, Congress granted individuals the right "to enter" public lands to establish a homestead. 12 Stat. 392. That right "to enter" was not limited to entering the homestead land on a single occasion in order to stake a claim to the land, but extended to the stakeholder the right to cross the surrounding public land whenever necessary to "reside upon [and] cultivate[ ]" the homestead. *Id.*

> Congress obviously believed that when development came, it would occur in a parallel fashion on adjoining public and private lands and that the process of subdivision, organization of a polity, and the ordinary pressures of commercial and social intercourse would work itself into a pattern of access roads.

Leo Sheep Co., 440 U.S. at 686.

Congress undisputedly passed the Homestead Act to induce Americans to settle and cultivate the lands of the West. *Ruddy*, 248 U.S. at 105. Indeed, Congress's manifest intent would be frustrated if grantees under the Homestead Act did not have the right to cross the retained lands of the United States to access their homesteads. *Cf. 9,947.71 Acres of Land*, 220 F.Supp. at 331 ("when the government granted mining rights . . . it granted, as a necessary corollary to mining rights, the right not only to pass over the public domain but also a property right to the continued use of such roadway or trail"); *see*

Curtin, 222 U.S. at 86 (the right of access is the very essence of land ownership); *see also United States v. Rindge*, 208 F. 611 (S.D.Cal. 1913) (United States attempted to claim easement across non-federal land to provide access to Homestead Act grantees). Thus, the very purpose of the Homestead Act would have been defeated if settlers were not granted an easement for permanent access to their land. *Cf. Montana Wilderness Ass'n*, 496 F.Supp. at 885-886.

C. The Doctrine Of Easement Implied By Prior Use Applies Against The Federal Government.

This Court has held that federal land grants "are not to be so construed as to defeat the intent of [Congress], or to withhold what is given, either expressly or by necessary or fair implication." *Denver & Rio Grande Ry. Co.*, 150 U.S. at 14. Accordingly, an easement for access may be implied from the terms of a federal land grant. *Superior Oil Co.*, 353 F.2d at 36-37; *Kinscherff*, 586 F.2d at 161. Indeed, this Court has qualified the general rule of construction to permit implied grants: "Nothing is to be taken as conceded but what is given in unmistakable terms, *or by an implication equally clear*," *Pearsall v. Great N. Ry. Co.*, 161 U.S. 646, 664 (1896) (emphasis added), and "the construction should be such as will effectuate the legislative intention, avoiding, if possible, an unjust or absurd conclusion," *United States v. Oregon & California R.R. Co.*, 164 U.S. 526, 539 (1896). In *Kinscherff*, the Tenth Circuit expressly held that an

implied easement may be created with a land patent. 586 F.2d at 161.

The Ninth Circuit, in this case, held that the application of the common law doctrine of easement implied by prior use is inappropriate in land patent cases because, "Although the government has historically provided for access across federal land to reach privately owned inholdings, that access was granted in the form of a license." App.11. The Ninth Circuit based its holding on its erroneous belief that nothing passes by implication in a federal land grant, citing *Albrecht v. United States*, 831 F.2d 196, 198 (10th Cir. 1987). App.11. *Albrecht*, however, provides no support for the Ninth Circuit's holding.

Albrecht does not involve the important issue of whether a patentee under the Homestead Act was granted an implied easement for access. Instead, the issue in *Albrecht* is who should benefit from a surveying error of 265 acres: the patentee or the United States. 831 F.2d at 198. Although the Tenth Circuit stated, in *dictum*, that "In a public grant nothing passes by implication, and unless the grant is explicit with regard to the property conveyed, a construction will be adopted which favors the sovereign rather than the grantee," immediately thereafter the Tenth Circuit held that the patentee would receive the benefit of any surveying error unless the United States could establish that the error was a product of gross mistake or fraud. *Id.* at 198-201. Thus, in *Albrecht*, the Tenth Circuit implicitly recognized that

property interests can pass by implication under a federal land grant.

Moreover, assuming that the Tenth Circuit's statement in *Albrecht* is a bold pronouncement, it is in direct and irreconcilable conflict with this Court's decision in *Denver & Rio Grande*. Thus, the Ninth Circuit's holding in the instant case is in direct conflict with *Denver & Rio Grande*, *Pearsall*, and *Kinscherff* and necessitates this Court's review to resolve the conflict.

The Ninth Circuit also stated that Congress may have intended to grant only "implied licenses" to settlers under the Homestead Act. App.11 (citing *Jenks*, 129 F.3d at 1353-1355). *Jenks*, however, erroneously relied upon *Buford v. Houtz* to support its "implied license" theory. *Jenks*, 129 F.3d at 1354. In *Buford*, this Court stated:

> there is an implied license, growing out of the custom of nearly a hundred years, that the public lands of the United States, especially those in which the native grasses are adapted to the growth and fattening of domestic animals, shall be free to the people who seek to use them, where they are left open and uninclosed [sic], and no act of government forbids this use.

133 U.S. 320, 326 (1890).

Nowhere in *Buford*, however, did this Court suggest that a person's right of access to lands patented under the Homestead Act is merely an "implied

license." In fact, access to private lands was not an issue; instead, the only issue was whether one livestock operator could enjoin another from grazing livestock on public lands. *Id.* at 324. Thus, *Buford* is inapposite.

Further, the Ninth Circuit's holding in this case creates the unjust conclusion that inholders have no protectable access rights because, according to the Ninth Circuit, an inholder's access is granted "in the form of a license." App.11. No settler would expend the time and money to establish a homestead if the only right of access was pursuant to an implied license because an implied license is easily revoked. *United States v. Grimaud*, 220 U.S. 506, 521 (1911). By definition, a "license" is "revocable at the will of the licensor and is not assignable." Black's Law Dictionary 920-921. A license, "since it is a mere personal privilege, cannot be assigned or transferred by the licensee. A license does not pass with the title to the property, but is only binding between the parties, expiring on the death of either party." 25 Am.Jur.2d Easements § 117. In contrast, an easement creates an irrevocable, "nonpossessory right to enter and use land in the possession of another" capable of conveyance. *Id.* Thus, to avoid the absurd and unjust conclusion that any access rights granted with a land patent expired at the first conveyance by the original patentee, an easement must be implied.

Moreover, with any land patent, including those issued pursuant to the Homestead Act, there exists the unmistakable implication that access is provided,

and is to be protected. After all, the right of access is fundamental to property ownership. Indeed, the reasonable use and enjoyment of private property clearly rests on an owner's ability to freely access his lands. *Curtin*, 222 U.S. at 86 ("[T]he right of access . . . [is among] the very essence of [a landowner's] proprietorship."); *Adams v. United States*, 3 F.3d 1254, 1259 (9th Cir. 1993) (landowners' "reasonable use and enjoyment clearly rests on their ability to freely access their property"). Accordingly, this Court should grant the Petition to establish that inholders may claim rights of access in the form of easements implied by prior use.

IV. THIS COURT SHOULD GRANT THE PETITION TO CLARIFY THAT AN EASEMENT IMPLIED BY NECESSITY OR IMPLIED BY PRIOR USE MAY NOT BE DEFEATED BY THE PERMISSIVE ALLOWANCE OF THE GRANTOR TO CROSS THE SERVIENT ESTATE.

Permissive access offered to an inholder is insufficient to defeat an easement implied by necessity. 4 Richard R. Powell, *Powell on Real Property* § 34.07[3] at 34-56 to 34-57 (Michael A. Wolf ed. 2001) ("It is no barrier to the finding of an easement by necessity that the benefited parcel is accessible under permission to cross other land that is revocable."); *see also Brown v. McAnally*, 644 P.2d 1153, 1158 (Wash. 1982) (*en banc*) (easement by necessity not defeated by permissive access); *Bear Creek Dev. Corp. v. Genessee*

Found., 919 P.2d 948, 952 (Colo.App. 1996) (holding a lease agreement for access would not defeat an easement by necessity); *Enzor v. Rasberry*, 648 So.2d 788, 793 (Fla.Dist.Ct.App. 1994) ("[W]hen access is permissive only, it does not act to defeat a claim for a common law easement by necessity."); *Herrera v. The Roman Catholic Church*, 819 P.2d 264, 268 (N.M.Ct.App. 1991) ("Revocable permission to use another's property does not negate an easement by necessity."); *Attaway v. Davis*, 707 S.W.2d 302 (Ark. 1986) (landlocked owner entitled to permanent right-of-way, not permissive, revocable one). Moreover, unlike prescriptive easements, claimants of easements implied by prior use need not show that their use was "open or notorious" and "adverse or hostile" to the grantor. *Compare* Restatement (Third) of Property (Servitudes) § 2.12 (outlining elements of easement implied by prior use) *with* Restatement (Third) of Property (Servitudes) § 2.16 (outlining elements of prescriptive easement). Thus, claims of easement implied by necessity or easement implied by prior use remain viable despite the grantor's permissive allowance that the grantee cross his land. Accordingly, any permissive access provided by the federal government is insufficient; an inholder's legally protectable right of access must be recognized.

In this case, in a scant two paragraphs of discussion, the Ninth Circuit's holding totally eviscerates the doctrine of easement implied by necessity when applied to inholders. Because non-motorized access is available in every National Park, National Forest,

National Wildlife Refuge, Bureau of Land Management property, and Wilderness Area, following the Ninth Circuit's logic no inholder would ever have the necessity required to create and maintain an easement implied by necessity. Thus, the Ninth Circuit's holding violates this Court's guidance that "the construction should be such as will effectuate the legislative intention, avoiding, if possible, an unjust or absurd conclusion." *Oregon & California R.R. Co.*, 164 U.S. at 539.

V. THIS COURT SHOULD GRANT THE PETITION BECAUSE THIS CASE PRESENTS AN ISSUE OF IMPORTANT NATIONAL SIGNIFICANCE REGARDING THE ACCESS RIGHTS OF PRIVATE PROPERTY OWNERS WHO POSSESS LAND WITHIN THE EXTERIOR BOUNDARIES OF FEDERAL LANDS.

The Ninth Circuit's holding in this case has the potential to affect tens of thousands of Americans: those landowners who own private property surrounded by federal lands. An estimated 1.2 million people own inholdings nationwide. *Conservation and Reinvestment Act of 1999: Hearing on H.R. 701 Before the H. Comm. on Resources*, 106th Cong. (June 12, 1999) (statement of Chuck Cushman, Executive Director, American Land Rights Ass'n). Nationally, not including Bureau of Land Management lands, more than 45 million acres of inholdings are estimated to be located within National Parks, National

Forests, National Wildlife Refuges, Wilderness Areas, and other federal lands. Stephen Stuebner, *Private Rights Vs. Public Lands: Thousands of Inholdings Create Conflicts Inside Federal Lands*, High Country News (Feb. 16, 1998). Indeed, within the National Parks alone, there are approximately 4.3 million acres of private inholdings. Sarah Gilman, *Two Weeks in the West*, High Country News (Apr. 28, 2008). The Ninth Circuit's holding totally eviscerates the doctrine of easement implied by necessity and directly impacts the access rights of all inholders within the National Parks and, by extension, those rights of all inholders within all other federal lands. Thus, this holding presents an insurmountable hurdle for inholders seeking to secure their rights of access to their private property. Accordingly, this Court should grant the Petition to clarify the access rights granted these landowners.

It has been the policy of this Court to grant certiorari in cases where an interpretation of a federal land grant statute has upset the settled expectations of millions of property owners. For example, in *Leo Sheep Co.*, this Court granted certiorari to determine whether the United States reserved an easement for the public to cross lands that were granted to Union Pacific Railroad. 440 U.S. at 669. Because this issue affected "property rights in 150 million acres of land[,]" this Court granted certiorari. *Id.* at 678. Similarly, in *Andrus v. Shell Oil Co.*, this Court

granted certiorari to decide whether oil shale deposits located prior to the Mineral Leasing Act[11] were patentable under the savings clause in that Act. 446 U.S. 657, 659 (1980). At stake was the ownership of hundreds of thousands of acres of land located primarily in Colorado, Wyoming, and Utah. "[B]ecause of the importance of the question to the management of the public lands[,]" this Court granted certiorari. *Id.* at 663. In another example, this Court granted certiorari in *Watt v. Western Nuclear, Inc.* to determine whether the "mineral" reservation in the Stock-Raising Homestead Act of 1916[12] included gravel. 462 U.S. 36, 37-38 (1983). Because of the importance of the issue "to the administration of more than 33 million acres of lands patented under the [Act]," this Court granted certiorari. *Id.* at 42.

The issues presented in this Petition are far more important than those this Court faced in *Leo Sheep Co.*, *Shell Oil*, or *Western Nuclear*. The Ninth Circuit's decision in this case affects the most fundamental of property rights – the right of access – for tens of thousands of property owners owning millions of acres of land. Therefore, this Court should grant the Petition to resolve the uncertainty in access rights possessed by these land owners.

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[11] 30 U.S.C. §§ 181-287.

[12] 43 U.S.C. §§ 291-302.

CONCLUSION

For the foregoing reasons, John McFarland respectfully requests that his Petition for Writ of Certiorari be granted.

Respectfully submitted by,

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Dated: December 22, 2008

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOHN JAMES MCFARLAND,
Plaintiff-Appellant,

v.

DIRK KEMPTHORNE, in his capacity as Secretary of the Department of the Interior; SUZANNE LEWIS, in her capacity as Superintendent of Glacier National Park; UNITED STATES OF AMERICA; NATIONAL PARK SERVICE,
Defendants-Appellees,

NATIONAL PARKS CONSERVATION ASSOCIATION,
Defendant-intervenor-Appellee.

No. 06-36106

D.C. No. CV-00-00020-M-DWM

OPINION

Appeal from the United States District Court
for the District of Montana
Donald W. Molloy, Chief District Judge, Presiding

Argued and Submitted
May 7, 2008 – Seattle, Washington

Filed October 2, 2008

Before: Arthur L. Alarcón, Susan P. Graber, and Johnnie B. Rawlinson, Circuit Judges.

Opinion by Judge Rawlinson

COUNSEL

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William J. Friedman (briefed), Charles H.P. Vance (briefed and argued), Covington & Burling LLP, Washington, D.C.; Jack R. Tuholske (briefed), Missoula, Montana, for the defendant-intervenor-appellee.

OPINION

RAWLINSON, Circuit Judge:

Appellant John J. McFarland (McFarland) contends that the district court erred in granting the defendants' motion for summary judgment. He asserts that he is entitled to an easement over Glacier Route 7 to access his property that is surrounded by Glacier National Park. Because McFarland cannot claim a common-law easement over federal land and because the National Park Service's (Park Service) denial of his permit request was neither arbitrary nor capricious, and was in accordance with governing law, we affirm the decision of the district court.

I. FACTS AND PROCEDURAL HISTORY

McFarland owns a 2.75 acre plot of land (the Property) located within the boundaries of Glacier National Park, in an area commonly known as "Big Prairie." The Property was conveyed to McFarland's predecessor in interest, Charles Schoenberger, in 1916 by a federal patent under the Homestead Act of 1862. The patent read: "TO HAVE AND TO HOLD the said tract of Land, with the appurtenances thereof, unto the said claimant and to the heirs and assigns of the said claimant, forever."

Glacier Route 7 passes through what is now Glacier National Park. It is, and always has been, the only road over which McFarland and his predecessors have had motorized access to the Property. Although the Park Service has prohibited snowmobiling in Glacier National Park since 1975 and has generally closed Glacier Route 7 to automobiles during the winter season, the Park Service continued to allow inholders some degree of motorized access over Glacier Route 7 in winter months until 1999.[1] In December, 1999, the Park Service notified McFarland that it would no longer allow inholders motorized access to Glacier Route 7 once it was closed to the general public. The Park Service stated that it was implementing this

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[1] As the district court noted in its Order granting the Defendant's Motion for Summary Judgment, the parties dispute the extent of motorized access permitted to inholders during the winter season prior to 1999.

policy to protect wildlife and public recreational opportunities.

A. Administrative Proceedings

In response to the Park Service's announcement that it would close Glacier Route 7 to inholders, McFarland filed an application for a special use permit. He requested year-round permission for his family and guests to drive a vehicle on Glacier Route 7 between the Property and the Polebridge Ranger Station. Additionally, McFarland requested permission to use a snowmobile when "road conditions make it unsafe or unpractical to drive . . . " The Park Service denied the permit request. McFarland's administrative appeal was also denied.

The Park Service explained its denial of McFarland's permit application by reference to previous correspondence, in which it explained that its policy decision to close Glacier Route 7 to motorized traffic during the winter was "made to protect wildlife concerns and public recreation values." The Park Service also referred to its 1975 determination, following "an Environmental Assessment that included extensive public review," that snowmobiles are "an incompatible public use." The 1975 determination was reaffirmed by the park's 1999 General Management Plan.

In the context of denying McFarland's permit application, the Park Service reasserted the authority of the Superintendent to enact public closures "based

upon a determination that: such action is necessary for the maintenance of public health and safety, protection of environmental or scenic values, protection of natural or cultural resources, aid to scientific research, implementation of management responsibilities, equitable allocation and use of facilities, or the avoidance of conflict among visitor use activities."

Mike Snyder, the Deputy Regional Director, affirmed that denial of McFarland's permit request was consistent with the Park Service's determination that use of snowmobiles would create visitor use conflicts and disturb wildlife habitats.

B. Federal Court Proceedings

McFarland filed suit in the United States District Court for the District of Montana, seeking to quiet title to an easement over Glacier Route 7. McFarland claimed an easement by necessity, an easement implied from the Homestead Act, and an express easement under the terms of the Schoenberger land patent. McFarland also alleged that the denial of his application for a special use permit violated the Administrative Procedure Act, 5 U.S.C. § 706(2). The district court originally dismissed McFarland's claims, concluding that they were barred by the Quiet Title Act's twelve-year statute of limitations. We reversed and remanded the case to the district court. *See McFarland v. Norton,* 425 F.3d 724, 729 (9th Cir. 2005). On remand, the district court granted summary

judgment in favor of the defendants. McFarland filed a timely appeal.

II. DISCUSSION

"This court reviews the district court's grant of summary judgment de novo." *Fitzgerald Living Trust (Fitzgerald II) v. United States,* 460 F.3d 1259, 1263 (9th Cir. 2006) (citations omitted). "We must determine, viewing the evidence in the light most favorable to the nonmoving party, whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law." *Id.* (citation omitted).

Under the Administrative Procedure Act, an agency decision will be set aside only if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). A federal court may not substitute its judgment for that of the agency. *See United States Postal Serv. v. Gregory,* 534 U.S. 1, 7 (2001). An agency decision may be reversed only if the agency "relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Safari Aviation Inc. v. Garvey,* 300 F.3d 1144, 1150 (9th Cir. 2002) (citation and internal quotation marks omitted). We must, however, ensure that the agency

has "articulated a rational connection between the facts found and the choice made." *Sierra Club v. EPA*, 346 F.3d 955, 961 (citation and alteration omitted), *as amended by* 352 F.3d 1186 (9th Cir. 2003).

McFarland contends that he is entitled to an easement over Glacier Route 7 to access his property. McFarland lays claim to an easement by necessity, an easement implied from the Homestead Act, and an easement expressed in the federal land patent to his predecessor-in-interest. Additionally, McFarland posits that the Park Service's denial of his special use permit was arbitrary, capricious, and otherwise not in accordance with the law.

We conclude that the district court properly granted the defendants' motion for summary judgment. McFarland has no valid claim to an easement. To the extent he has a right to access his property across federal land, that right is subject to the reasonable regulation of the Park Service, implemented through the permitting process. The Park Service's denial of McFarland's special use permit was not arbitrary, capricious, or in violation of the law.

A. Easement Claims

Federal law governs a claim of easement over lands owned by the United States. *See Superior Oil Co. v. United States*, 353 F.2d 34, 37 n.4 (9th Cir. 1965). McFarland acknowledges that federal law governs the claimed easement in this case, but asserts that state law is "instructive" on points not

addressed by federal law. However, the "instructive" value of state law is limited by federal interests. *See United States v. Standard Oil Co. of Cal.*, 332 U.S. 301, 309-310 (1947). Considering the parameters articulated in *Standard Oil*, the strong federal interest in the management of federal land weighs against the importation of state law to resolve the present case. *See Fitzgerald (Fitzgerald I) v. United States*, 932 F. Supp. 1195, 1201 (D. Ariz. 1996) (noting that the Federal Land Policy and Management Act (FLPMA) consolidated authority to grant rights-of-way over federal land by "repeal[ing] over thirty statutes granting rights-of-way across federal lands and vest[-ing] in the Secretaries of Agriculture and the Interior [the] authority to grant, issue, or renew rights of way over . . . public lands . . . ") (citation, alteration and internal quotation marks omitted).

1. Easement by Necessity

[1] The doctrine of easement by necessity applies, generally, against the United States. *Mont. Wilderness Ass'n v. United States Forest Serv.*, 496 F. Supp. 880, 885 (D. Mont. 1980); *see also United States v. Dunn*, 478 F.2d 443, 444 & n.2 (9th Cir. 1973). "An easement by necessity is created when: (1) the title to two parcels of land was held by a single owner; (2) the unity of title was severed by a conveyance of one of the parcels; and (3) at the time of severance, the easement was necessary for the owner of the severed parcel to use his property." *Fitzgerald II*, 460 F.3d at 1266 (citations omitted).

[2] However, an easement by necessity does not exist if the claimant has another mode of access to his property. *See id.*; *see also Mackie v. United States,* 194 F. Supp. 306, 308 (D. Minn. 1961). In fact, necessity may be defeated by alternative routes or modes of access – no matter how inconvenient. *See Mackie,* 194 F. Supp. at 308 (finding no necessity where plaintiff could drive within one-third mile of a lake, carry his supplies to the lake, load a boat and cross the lake to his property). McFarland has year-round access to his property over Glacier Route 7. In the winter, this access is limited to non-motorized means. We conclude that even subject to the seasonal limitations imposed by the Park Service, and in spite of the associated inconvenience, McFarland enjoys sufficient access to his property to defeat a finding of easement by necessity.

2. Express Easement Claim

[3] McFarland contends that he is the holder of an express easement arising from the language of the Schoenberger Patent, which conveys the property "with the appurtenances thereof." We rejected a similar argument in *Fitzgerald II,* where a property owner also claimed an express easement over federal land based on the term "appurtenances" in the land patent. 460 F.3d at 1267. "While the word 'appurtenance' will carry with it an existing easement, it will not create the easement." *Id.* (citations omitted); *see also United States v. Jenks,* 129 F.3d 1348, 1355 (10th Cir. 1997). Thus, unless an easement existed at the

time of the grant, McFarland holds no easement. *See Jenks,* 129 F.3d at 1355. As discussed above, McFarland could not claim an easement at the time of the grant, and his argument is undermined by his own representation that his "predecessor's . . . access into his property . . . was not protected by any county road easement or other guarantee of continued access."

McFarland cites *Hunter v. United States,* 388 F.2d 148, 153-54 (9th Cir. 1967), and *Humphreys v. McKissock,* 140 U.S. 304, 314 (1891), to support his claim of an express easement. Both cases are distinguishable. *Hunter* involved a question of what rights were appurtenant to an appropriated water right on federal land. 388 F.2d at 153-54. The court held that a grazing right was not appurtenant to the water rights because it was not necessary to the utilization of the water rights. *Id.* at 154. Similarly, *Humphreys* addressed whether an elevator was appurtenant to a railroad. 140 U.S. at 314-15. The discussion of the meaning of "appurtenant" in these cases in no way bolsters McFarland's argument or blunts the holding of *Fitzgerald II* that an express easement must be expressly conveyed.

3. Implied Easement

[4] McFarland contends that he is the holder of an easement implied from existing use, created at the time of the land patent under the Homestead Act by virtue of seven years of "use so long and manifest as

to show that it was meant to be permanent." McFarland attempts to bolster this argument by pointing to the Homestead Act's language recognizing a right "to enter" public lands to establish a homestead. However, *Fitzgerald II* makes clear that this language does not create an implied easement. *See* 460 F.3d at 1265 ("[T]he Homestead Act did not grant settlers a vested property right of access over public lands to their homesteads, but instead merely sanctioned the longstanding customary use of public lands by a settler."). Moreover, application of the common-law doctrine of easement implied by prior use is not appropriate in this case, where title was taken by way of a public grant. "In a public grant nothing passes by implication, and unless the grant is explicit with regard to the property conveyed, a construction will be adopted which favors the sovereign . . . " *Albrecht v. United States,* 831 F.2d 196, 198 (10th Cir. 1987) (citation omitted). Although the government has historically provided for access across federal land to reach privately owned inholdings, that access was granted in the form of a license. *See Jenks,* 129 F.3d at 1353-55.

B. Regulation of Access

[5] The Property Clause gives Congress plenary power to regulate the use of federal land. U.S. Const. art. IV, § 3, cl. 2; *see United States v. Gardner,* 107 F.3d 1314, 1318 (9th Cir. 1997) (recognizing that "the power over the public land thus entrusted to Congress [under the Property Clause] is without limitations")

(citations and alteration omitted). The Park Service's authority to regulate use of federal land within the Park is rooted in the Constitution and the National Park Service Organic Act (Organic Act), 16 U.S.C. § 1. *See Bicycle Trails Council of Marin County v. Babbitt,* 82 F.3d 1445, 1454 (9th Cir. 1996), *as amended.* The Secretary's authority "applies with equal force to regulating an established right of way within the park." *United States v. Vogler,* 859 F.2d 638, 642 (9th Cir. 1988) (citation omitted). Even where a statutory right of access exists, the Park Service has broad discretion to regulate its use. *See Hale v. Norton,* 476 F.3d 694, 699-700 (9th Cir. 2007), *cert. den. sub nom. Hale v. Kempthorne,* 128 S. Ct. 804 (2007). The proper mechanism for such regulation is the permitting process. *See Adams v. United States,* 255 F.3d 787, 795 (9th Cir. 2001).

C. Special Use Permit

McFarland contends that the denial of his special use permit was arbitrary and capricious, an abuse of discretion, and otherwise not in accordance with the law. McFarland expressly asserts that the Park Service "failed to articulate a satisfactory explanation for its decision."

[6] McFarland's reliance on *Motor Vehicle Mfrs. Ass'n (Motor Vehicle) v. State Farm Mutual Auto. Ins. Co.,* 463 U.S. 29, 43 (1983), and *Ry. Labor Executives' Ass'n v. Interstate Commerce Comm'n,* 784 F.2d 959, 964 (9th Cir. 1986), is misplaced. An agency must

"articulate a satisfactory explanation for its action . . . " *Motor Vehicle,* 463 U.S. at 43 (citation omitted). However, the critical factor in *Motor Vehicle* was that the agency "submitted no reasons at all" for its decision. *Id.* at 50.

Similarly, in *Ry. Labor Executives' Ass'n,* we declined to enforce an agency order due to its "total failure to articulate any reason for refusing to impose labor protections[,]" making it "impossible for us as a reviewing court to understand why the [agency] chose to deny rather than impose protections . . . " 784 F.2d at 975.

[7] McFarland contends that the Park Service did not consider facts unique to his situation. However, a court "will . . . uphold a decision of less than ideal clarity if the agency's path may be reasonably discerned." *Motor Vehicle,* 463 U.S. at 43 (citations and internal quotation marks omitted). The National Park Service's written decision and other correspondence clearly explained its reasons for closing the road and declining to make an exception for McFarland. The agency's path to its decision is easily followed by reading the correspondence between the Park Service and McFarland. Ultimately, the Park Service determined that its concerns for wildlife and recreation in the national park justified closing Glacier Route 7 to motorized vehicles during the winter season.

[8] "If an agency's determination is supportable on any rational basis, we must uphold it." *Voyageurs*

Nat'l Park Ass'n v. Norton, 381 F.3d 759, 763 (8th Cir. 2004) (citation omitted). "This is especially true when an agency is acting within its own sphere of expertise." *Id.* (citation omitted). As in *Voyageurs National Park Ass'n,* the Park Service acted within the sphere of its expertise when it decided not to grant McFarland's request. *Cf. id.* at 763-64 (deferring to the Park Service in an analogous circumstance). Therefore, we conclude that the Park Service did not act arbitrarily, capriciously, or in violation of law when it denied McFarland's permit request.

III. CONCLUSION

McFarland is not entitled to an easement by necessity. Nor was an easement expressly granted in the original land patent or implied through language of the Homestead Act or through McFarland's use of Glacier Route 7. Finally, the Park Service provided adequate explanation of the denial of McFarland's permit request to allow us to determine that it did not act arbitrarily, capriciously, or in violation of law. Accordingly, we affirm the district court's entry of judgment in favor of the government defendants.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

JOHN JAMES McFARLAND, Plaintiff, vs. DIRK KEMPTHORNE, in his capacity as Secretary of the Department of Interior; SUZANNE LEWIS, in her capacity as Superintendent of Glacier National Park, Defendants, and NATIONAL PARKS CONSERVATION ASSOCIATION, Defendant-Intervenor.	CV 00-20-M-DWM ORDER (Filed Nov. 17, 2006)

I. Introduction

Plaintiff, John McFarland, owns a tract of land completely surrounded by Glacier National Park. McFarland brought suit against the United States to quiet title to an easement along Glacier Route 7, the road McFarland uses to access his property. Specifically, McFarland's suit alleges the National Park Service's closure of Glacier Route 7 to motorized vehicles during winter months interferes with his vested property rights. The suit also challenges the Park Service's denial of McFarland's request for a

special use permit to drive and snowmobile on Glacier Route 7 during the winter. Before the Court are the parties' cross-motions for summary judgment.

II. Factual and Procedural Background

McFarland owns a 2.75 acre plot of land located within the boundaries of Glacier National Park, in an area commonly referred to as Big Prairie (the "Property"). Stipulation of Facts ¶ 1; Defs.' Undisp. Facts ¶ 1. The Property was originally granted to Charles F.W. Schoenberger. Defs.' Undisp. Facts Ex. 4. Prior to 1916, Schoenberger staked a claim to the Property pursuant to the Homestead Act of 1862, which permitted individuals "to enter upon . . . unappropriated public lands" to establish homesteads. Act of May 20, 1862, 12 Stat. 392-93; Pl.'s Undisp. Facts ¶ 11. The Property was granted to Schoenberger in a 1916 land patent issued by President Woodrow Wilson. Defs.' Undisp. Facts Ex. 4. The land patent granted: "TO HAVE AND TO HOLD the said tract of Land, with the appurtenances thereof unto the said claimant and to the heirs and assigns of the said claimant, forever." Defs.' Undisp. Facts Ex. 4.

A gravel road, variously known as the North Fork Road, the Inner North Fork Road, and Glacier Route 7 (hereinafter "Glacier Route 7"), exists generally running north and south adjacent to the Property. Stipulation of Facts ¶ 2; Defs.' Undisp. Facts ¶ 6. Glacier Route 7 was originally constructed in 1901 by the Butte Oil Company to permit access to a mining

claim at Kintla Lake. Pl.'s Undisp. Facts ¶ 5; Defs.' Undisp. Facts ¶ 7. It extends nearly to the Canadian border approximately 15 miles north of the Property and to the Village of Apgar approximately 30 miles south of the Property. Stipulation of Facts ¶ 2. Approximately 3.2 miles south of the Property, a spur road branches off of Glacier Route 7 at the Polebridge Ranger Station and exits Glacier National Park. Stipulation of Facts ¶ 2. Glacier Route 7 is, and always has been, the only road over which McFarland and his predecessors in title have been able to drive a motorized vehicle between the Property and the Polebridge Ranger Station to exit Glacier National Park. Stipulation of Facts ¶ 3.

Snowmobiling has been generally prohibited in Glacier National Park since 1975. Defs.' Undisp. Facts ¶¶ 51-53. Additionally, Glacier Route 7 is closed to automobiles seasonally by snow. Defs.' Undisp. Facts ¶ 33. The closure date and duration varies. Defs.' Undisp. Facts ¶ 33. Historically, however, the portion of Glacier Route 7 from the Polebridge Ranger Station to the Property has been closed from December 1 to May 1. Administrative Record ("AR") at 36. Prior to 1999, Park Service rangers permitted inholders to access their property in winter using motorized means along Glacier Route 7. Pl.'s Undisp. Facts ¶¶ 26-27; Defs.' Undisp. Facts ¶ 40-42. When a gate was placed across Glacier Route 7 at Polebridge Ranger Station in 1988, the Park Service implemented a double-lock system to allow inholders motorized access to their properties. Stipulation of

Facts ¶ 4; Pl.'s Undisp. Facts ¶¶ 35-36; Defs.' Undisp. Facts ¶ 42. The parties dispute the extent of the inholders' authorized access. McFarland claims access was permitted throughout the winter months. Pl.'s Undisp. Facts ¶¶ 26, 35-36. Defendants assert access was limited to the shoulder season on either end of the winter months. Defs.' Undisp. Facts ¶¶ 41-42. In any event, in December 1999, National Park Ranger Scott Emmerich sent McFarland an email message informing him that "a policy decision ha[d] been made that no one will drive park roads once they are closed to the public." AR at 36. Emmerich indicated the decision was made to protect wildlife and public recreational opportunities. AR at 36.

Prior to the Park Service's policy decision, McFarland had informed the Park Service he intended to live on the Property year-round with his wife and three children. AR at 29, 36. After being informed he could not access the Property by motorized means during the winter, McFarland filed an application with the Park Service for a special use permit. AR at 46-47. Specifically, McFarland requested permission to:

> 1. Use a vehicle to drive the 3.2 mile distance between our home and the Polebridge Ranger Station at such times as the Park Service has otherwise closed the road to public access by vehicle.
>
> 2. The freedom to unlock the gate and gain access to our property at any time without

> further assistance from Park Service personnel.
>
> 3. In the event the road conditions make it unsafe or unpractical to drive, I want to use a snowmobile for the limited purpose of traveling the short distance to my home.
>
> 4. Provide access for our guests to come and visit or stay at our home. Such access shall be in the same matter as requested above.

AR at 14-17. The permit request was denied in a January 24, 2000 letter from Acting Superintendent of Glacier National Park John Shireman. AR at 56. The letter indicated the special use permit was denied in accordance with the Park Service's authority to close park areas to the public when "necessary for the maintenance of public health and safety, protection of environmental or scenic values, protection of natural or cultural resources, aid to scientific research, implementation of management responsibilities, equitable allocation and use of facilities, or the avoidance of conflict among visitor use activities." AR at 56; see also 36 C.F.R. 1.5(a). The letter stated the broad terms outlined in McFarland's request were not acceptable, but authorized McFarland to keep a snowmobile on the Property for use in medical emergencies. AR at 56. McFarland appealed the permit denial to the Deputy Regional Director of the Park Service on March 14, 2000. Pl.'s Undisp. Facts Ex. 23. Deputy Regional Director Mike Snyder subsequently affirmed the denial, approving of Shireman's conclusion that snowmobile use would interfere with winter

recreational opportunities and negatively impact wildlife. Pl.'s Undisp. Facts Ex. 24.

McFarland subsequently filed suit, seeking to quiet title to an easement over Glacier Route 7. See Quiet Title Act, 28 U.S.C. § 2409a. McFarland claimed an easement by necessity, an easement implied from the Homestead Act, and an express easement under the terms of the Schoenberger land patent. McFarland also alleged the Park Service's denial of his request for a special use permit should be set aside under the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701 et seq. This Court originally dismissed McFarland's claims, concluding they were barred by the Quiet Title Act's twelve-year statute of limitations. The Ninth Circuit reversed and remanded the case back to this Court. McFarland v. Norton, 425 F.3d 724, 728 (9th Cir. 2005) (concluding statute of limitations had not run because quiet title claim did not accrue until the Park Service denied McFarland access to Glacier Route 7 in 1999). Both parties have moved for summary judgment on all of McFarland's claims.

III. Analysis

A. Summary Judgment Standard

Summary judgment is proper if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as

a matter of law." Fed. R. Civ. P. 56(c). The party moving for summary judgment bears the initial burden of demonstrating the absence of a genuine issue of material fact. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256 (1986). A fact is material if it could affect the outcome of the suit under the governing substantive law. Id. at 248. If there is no genuine issue of material fact, the court must determine whether the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). In deciding a motion for summary judgment, the evidence of the non-moving party is to be believed and all justifiable inferences are drawn in its favor. Anderson, 477 U.S. at 255.

Summary judgement is a particularly appropriate tool for resolving claims challenging agency action under the APA. See Occidental Eng'g Co. v. INS, 753 F.2d 766, 770 (9th Cir. 1985). When a district court is reviewing the decision of an administrative agency, the administrative agency acts as the fact finder and the district court's role is limited to deciding the legal question of whether the agency could reasonably have found the facts as it did. Id.

B. Easement by Necessity

McFarland first claims an easement by necessity over Glacier Route 7. "An easement by necessity is created when: (1) the title to two parcels of land was held by a single owner; (2) the unity of title was severed by a conveyance of one of the parcels; and (3)

at the time of severance, the easement was necessary for the owner of the severed parcel to use his property." Fitzgerald Living Trust v. United States, 460 F.3d 1259, 1266 (9th Cir. 2006).[1] To find an easement by necessity, the necessity must exist both at the time of severance of unity of title and at the time of exercise of the easement. Id. The easement expires once the necessity ceases to exist. Id. McFarland bears the burden of proving each element of an easement by necessity. See Barnes v. Babbitt, 329 F. Supp. 2d 1141, 1148-49 (D. Ariz. 2004).

Defendants do not dispute that unity of title existed and was severed in 1916 when the United States conveyed the Property to Schoenberger. Instead, Defendants argue (1) an easement by necessity cannot exist against the United States and (2) an easement is not necessary here because McFarland has two alternative routes of access to the Property.

1. Easement by Necessity Against the United States

Defendants cite Leo Sheep Co. v. United States, 440 U.S. 668 (1979), and a 1980 United States Attorney General Opinion in support of their assertion

[1] Because McFarland claims an easement over lands owned by the United States and no federal statute makes state or local law applicable, federal law governs McFarland's easement claims. See Superior Oil Co. v. United States, 353 F.2d 34, 37 n.4 (9th Cir. 1965).

that an easement by necessity cannot lie against the United States. See Rights-of-Way Across National Forests, 43 Op. Att'y Gen. 243, 255 (1980). Leo Sheep, however, does not support Defendants' proposition. Leo Sheep addressed whether the United States can obtain an easement over privately-owned land by necessity, and concluded it cannot because the government has the power to take an easement by eminent domain. 440 U.S. at 679-80. Leo Sheep did not address whether private landowners can obtain an easement by necessity against the United States. Additionally, no court of appeals has held, as a matter of law, that an easement by necessity cannot lie against the United States. In fact, in Fitzgerald, the Ninth Circuit expressly left this question open. 460 F.3d at 1266. Finally, under this Court's precedent, an easement by necessity can be asserted against the United States. Mont. Wilderness Assoc. v. U.S. Forest Serv., 496 F. Supp. 880, 885 (D. Mont. 1980). McFarland therefore can obtain an easement by necessity against the United States if he satisfies the required elements.

2. Alternative Access

An easement by necessity does not exist if the claimant has another mode of access to his property. Mackie v. United States, 194 F. Supp. 306, 308 (D. Minn. 1961); see also Fitzgerald, 460 F.3d at 1266. Defendants claim two alternative routes of access to the Property defeat necessity in this case. Defendants first claim McFarland can access his property via

Flathead County Road 486. Flathead County Road 486 runs along the west side of the North Fork of the Flathead River outside the boundaries of Glacier National Park. Defs.' Undisp. Facts ¶ 10. Defendants assert the Property can be accessed in the winter by driving Flathead County Road 486 to an access road down to Flathead River. Defs.' Undisp. Facts ¶ 11. According to Defendants, McFarland can then ski, canoe, or wade across the river to access the Property. Defs.' Undisp. Facts ¶ 11. In response, McFarland claims use of this alternative route would require him to cross private lands held by third-parties. Defendants do not dispute this fact. An easement by necessity is not defeated by a grantee's ability to access a public road over a third-party's property. Fitzgerald, 460 F.3d at 1266. This alternative route therefore does not defeat McFarland's claim of necessity.

Defendants also claim an easement is not necessary because the Park Service allows McFarland to access the Property over Glacier Route 7 year-round, via motorized means for three seasons of the year and non-motorized means during the winter. Defendants note McFarland has accessed the Property in winter on previous occasions by skiing or snowshoeing along Glacier Route 7 from the Polebridge Ranger Station. Defs.' Undisp. Facts ¶ 38. The 3.2 mile trip, with skis and pulling a sled, takes between one hour and one-and-a-half hours. Defs.' Undisp. Facts ¶ 38. If McFarland's children accompany him on the trip, it takes approximately three hours. Pl.'s Statement of Genuine Issues ¶ 38. McFarland contends this

alternative route places a significant burden on his right to enjoy his land and is not reasonable.

Although accessing the Property by skis or snowshoes may be inconvenient, it defeats any necessity in this case. To obtain an easement by necessity, the claimant must demonstrate strict necessity; it is not sufficient to show other means of access are merely inconvenient. Mackie, 194 F. Supp. at 208; see also Fitzgerald, 460 F.3d at 1267 (concluding statutory right to access that is adequate to secure reasonable use and enjoyment of property defeats necessity); United States v. Jenks, 129 F.3d 1348, 1354 n.3 (10th Cir. 1997). McFarland may access the Property via Glacier Route 7 by foot, skis, snowshoes, or horseback during winter months. The 3.2 mile trip is much less burdensome than the alternative mode of access found to defeat necessity in Mackie v. United States, 194 F.Supp. 306, 308 (D. Minn. 1961). In Mackie, the court determined an alternate route which required the property owner to leave his automobile eight miles from his residence, walk one and one-half miles to a lake, and then travel by boat across three lakes with short portages between the lakes defeated any necessity for an easement. See also Jenks, 129 F.3d at 1354 n.3 (10th Cir. 1997) (concluding access on road via four-wheel drive vehicle, although difficult, defeated necessity). Because motorized access via Glacier Route 7 during the winter is not strictly necessary for McFarland to access the Property, McFarland's claim to an easement by necessity fails.

Even if McFarland were entitled to an easement by necessity, the scope of that easement would not be unlimited. Leo Sheep, 440 U.S. at 680 n.15 ("The scope of [an easement by necessity] embodies the best judgment of the court as to what is reasonably essential to the land's use." (citation omitted)). The scope of any easement would first be limited by the needs of the servient estate. Soltis v. Miller, 282 A.2d 369, 360 (1971); 25 Am. Jur. 2d § 80. In this case, the servient estate, a portion of Glacier National Park commonly referred to as Big Prairie, is maintained by the Park Service for the enjoyment of the general public. Defs.' Undisp. Facts ¶ 1. The area is accessed by "20 people per day on the weekends and approximately four people per day during the weekdays" in the winter. Defs.' Undisp. Facts ¶ 39; Pl.'s Statement of Genuine Issues ¶ 39. Permitting McFarland to access the Property by motorized means would interfere with the winter recreational activities of these members of the general public. Defs.' Undisp. Facts ¶ 39, Ex. 28.

Any easement McFarland possessed would also be subject to reasonable regulation by the Park Service. U.S. Const. Art. IV, § 3, cl. 2 (granting Congress authority and responsibility to manage federal lands); Hale v. Norton, 437 F.3d 892, 894 (9th Cir. 2006) (determining the existence of a right-of-way over national park land does not shield an inholder from reasonable regulation by the Park Service); Adams v. United States, 3 F.3d 1254, 1259 (9th Cir. 1993) (observing preservation of land is an important consideration where the United States owns the

servient estate for the benefit of the public); see also Fitzgerald, 460 F.3d at 1263 (noting government has authority to impose some regulations on the use of roads regardless of any common law easements held by private individuals). Congress has charged the Park Service with the task of

> promot[ing] and regulat[ing] the use of the . . . national parks . . . by such means and measures as conform to the fundamental purpose of the said parks . . . which purpose is to conserve the scenery and the natural and historic objects and the wild life therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations.

16 U.S.C. § 1. The Park Service closes Glacier Route 7 to motorized vehicles in the winter for reasons of safety, environmental resource protection, facilitation of winter recreational opportunities, and protection of the road from damage. Defs.' Undisp. Facts ¶ 36. Big Prairie is one of the few prairie savanna habitats west of the Continental Divide. Defs.' Undisp. Facts ¶ 21. It is home to grey wolfs [sic], grizzly bears, bald eagles, coyote, moose, and many other species. Defs.' Undisp. Facts ¶¶ 21-25. Permitting McFarland to access the Property by motorized means during the winter would adversely impact the wildlife of Big Prairie. Defs.' Undisp. Facts ¶¶ 45, 47-49. Additionally, Park Service regulation of access on Glacier Route 7 serves to protect winter recreational opportunities for the general public in the Big Prairie area.

As discussed above, permitting McFarland to access the Property by motorized means during the winter would significantly diminish these opportunities. The Park Service currently permits McFarland to access the Property along Glacier Route 7 by non-motorized means and egress by snowmobile in emergency situations during the winter. Even if McFarland possessed an easement by necessity, the access currently permitted by the Park Service would be reasonable in light of its responsibility to protect the resources in Glacier National Park.

In sum, McFarland does not possess an easement by necessity over Glacier Route 7 because he has an alternative route of access to the Property. McFarland can walk, ski, snowshoe, or ride on horseback along Glacier Route 7 to reach the Property. Although this means of access may be inconvenient, it defeats McFarland's claim of necessity. Alternatively, even if McFarland were entitled to an easement by necessity over Glacier Route 7, the easement could be limited in scope to the access currently permitted by the Park Service, i.e., access by non-motorized means and egress by snowmobile in emergency situations during the winter and motorized means during the remainder of the year. National park lands surrounding the Property provide unique winter recreational opportunities for the general public. This land also provides one of the few prairie savanna habitats west of the Continental Divide. Prohibiting the year-round motorized access McFarland seeks is reasonably necessary to protect wildlife in the area and facilitate winter

recreational opportunities for the general public. Accordingly, Defendants are entitled to summary judgment on McFarland's easement by necessity claim.

C. Easement Implied Under the Homestead Act of 1862

McFarland alternatively asserts the Homestead Act of 1862 granted an implied easement for access across federal lands to lands patented under the Act. This argument, however, was foreclosed by Fitzgerald Living Trust v. United States, 460 F.3d 1259 (9th Cir. 2006), decided by the Ninth Circuit after the parties' cross-motions for summary judgment were fully briefed in this case. In Fitzgerald, owners of property completely surrounded by the Sitgreaves National Forest brought suit against the United States under the Quiet Title Act, seeking an easement to access their property. 460 F.3d at 1261-62. The property owners were successors in title to land granted by President Wilson under the Homestead Act in 1920. Id. at 1261. The owners argued, inter alia, that they possessed an easement implied from language contained in the Homestead Act. Id. at 1265. The Ninth Circuit adopted the Tenth Circuit's reasoning in United States v. Jenks, 129 F.3d 1348 (10th Cir. 1997) in concluding that an easement could not be implied from the Homestead Act. Fitzgerald, 460 F.3d at 1265. The Ninth Circuit determined that although "the Homestead Act contemplated an inholder's access to his property over public lands . . . the access

across government lands implied into the Homestead Act is not an implied easement." Id. The court left open the possibility that an implied license to use public lands might exist under the Homestead Act. Id. McFarland, however, does not assert he possesses an implied license to use Glacier Route 7.[2] Rather, he seeks to quiet title to a vested property right, a right that does not exist under the Homestead Act. See id. Defendants therefore are entitled to summary judgement on McFarland's implied easement claim.

D. Express Easement Under the Schoenberger Patent

McFarland alternatively claims the 1916 land patent issued by President Wilson, which conveyed the Property to Schoenberger, granted an express easement over Glacier Route 7. In particular, McFarland points to the language in the land patent conveying the Property, "with the appurtenances thereof." McFarland contends conveyance of appurtenances includes all things necessary for the enjoyment of the land, and in particular, an easement for access. This argument, however, was also foreclosed by Fitzgerald. The property owners in Fitzgerald also claimed an express easement over federal lands based on appurtenances language in the land patent conveying property to their predecessor in title. Id. at

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[2] McFarland abandoned his implied license claim in his Amended Complaint.

1267. The Ninth Circuit rejected this argument, concluding the language "with the appurtenances thereof" lacks the intent and specificity necessary to create an express easement. Id. The court did note that the word "appurtenances" carried any existing easements. Id. McFarland, however, has not alleged an easement existed over Glacier Route 7 prior to conveyance in the 1916 land patent. Therefore, McFarland does not possess an express easement over Glacier Route 7, and Defendants are entitled to summary judgment on this claim.

E. APA Claim

McFarland also appeals the Park Service's denial of his request for a special use permit. McFarland applied for a permit to access his property by automobile via Glacier Route 7 in the winter when the road is otherwise closed to the public. AR at 46. McFarland also requested permission to access the Property by snowmobile when road conditions make it unsafe or impractical to drive a vehicle. AR at 46. The Park Service denied McFarland's request, citing its authority to close areas of the park to the public to protect health and safety, protect wildlife and natural resources, and avoid conflicts among visitor use activities. AR at 56-57. This decision was affirmed following McFarland's appeal. Pl.'s Undisp. Facts Ex. 24.

Pursuant to the APA, a district court may set aside an agency decision only if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). Review under this standard is narrow. U.S. Postal Serv. v. Gregory, 534 U.S. 1, 6-7 (2001). A district court may not substitute its judgment for that of the agency. Id. at 7. An agency decision can only be reversed if the agency relied on impermissible factors, entirely failed to consider an important factor, offered an explanation for its decision that runs counter to the evidence presented, or made a decision that is so implausible it could not be ascribed to a difference in view or the product of agency expertise. Safari Aviation Inc. v. Garvey, 300 F.3d 1144, 1150 (9th Cir. 2002). Although the district court's review is narrow, it must be searching and careful. Marsh v. Or. Natural Res. Council, 490 U.S. 360, 378 (9th Cir. 1989). The district court must, for example, ensure that the agency has articulated a rational connection between the facts found and the conclusion made. Sierra Club v. EPA, 246 F.3d 955, 961 (9th Cir. 2003).

As an initial matter, Defendants claim McFarland's APA claim is barred because the Quiet Title Act is the exclusive means by which an adverse claimant can challenge the United States' title to real property. See Block v. North Dakota ex rel. Bd. of Univ. and Sch. Lands, 461 U.S. 273, 286 (1983). McFarland's APA claim, however, does not assert title to an easement over Glacier Route 7. McFarland seeks an easement in his Quiet Title Act claims.

McFarland's APA claim challenges the Park Service's denial of his request for a special use permit. In his special use permit application, McFarland sought permission to use a vehicle and snowmobile to access the Property; he was not seeking title to an easement. The APA therefore does provide a cause of action for McFarland to challenge the Park Service's permit denial.

McFarland identifies three reasons for reversing the Park Service's decision. First, he claims denial of the permit is contrary to the express language of the Glacier Park Act and the Park Service's long-standing interpretation of that Act. Second, McFarland argues denial of the permit was arbitrary and capricious because the Park Service failed to articulate a satisfactory explanation for its decision and failed to consider an important factor. Finally, McFarland contends denial of the permit was contrary to law because the Park Service did not comply with its own regulations regarding road closures.

1. The Glacier Park Act

The Glacier Park Act provides, in relevant part, "[n]othing herein contained shall affect any valid claim, location, or entry existing under the land laws of the United States before May 11, 1910, or the rights of any such claimant, locator, or entryman to the full use and enjoyment of his land." 16 U.S.C. § 161. McFarland argues this provision guarantees him unrestricted access to the Property as necessary

for the full use and enjoyment of the land because McFarland's predecessor in interest established a homestead before 1910. McFarland's reading of the provision, however, is inconsistent with its plain language. The clear intent of the provision was to ensure that the creation of Glacier National Park did not extinguish existing homestead entries within the boundaries of the Park that had not yet been perfected. In fact, it is this provision that allowed McFarland's predecessor in title to perfect his title to the Property in 1916, after Glacier National Park was established.

As an alternative to the above argument, McFarland claims, even if the Glacier Park Act did not address inholder access rights, the Park Service has historically interpreted the Act to protect inholder rights and cannot now abandon its interpretation. McFarland contends evidence of the Park Service's long-standing interpretation of the Act exists in the 1985 Land Protection Plan. AR at 244-334. An agency's interpretation of a statute that conflicts with the agency's earlier interpretation is given less deference than a consistently held interpretation. Young v. Reno, 114 F.3d 879, 883 (9th Cir. 1997) (quotation omitted). The sections of the Land Protection Plan cited by McFarland, however, can hardly be said to constitute the Park Service's interpretation of the Glacier Park Act. In fact, most of McFarland's cites are taken completely out of context and reassembled in deviation of their original intent. This restructuring is especially egregious in this case

where the document McFarland relies on explicitly states the Park Service's interpretation of the relevant Glacier Park Act provision. The Land Protection Plan notes the purpose and intent of the relevant provision

> is to clarify that the establishment of the park did not nullify the right for holders of unpatented claims and homesteads to receive patent to their claimed lands. Furthermore, they can continue to use these lands even though patent had not yet been granted. It does not limit the authority of the National Park Service to acquire lands within the park boundaries or the right to regulate land use. Protection of resource values and the right of the public to enjoy the park must receive priority if there is a conflict.

AR at 258. This interpretation is consistent with the plain language of the Glacier Park Act, and the Park Service's denial of McFarland's permit is consistent with this interpretation. See Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842-43 (1984). McFarland thus has not demonstrated the Park Service's decision was contrary to law.

2. Arbitrary and Capricious

McFarland next argues the Park Service's permit denial was arbitrary and capricious. He claims the Park Service failed to articulate a satisfactory explanation for its decision because the letter denying the

permit listed reasons why the general public's use of national parks could be restricted, but failed to explain why McFarland's right to access the Property was restricted. McFarland further contends the denial of his administrative appeal only addressed his request for snowmobile access, not his request for vehicular access. Finally, McFarland argues the Park Service failed to consider his claim to an easement in denying the permit.

Although the letter denying McFarland's request for a special use permit is neither lengthy nor detailed, the Park Service's decision was not arbitrary and capricious. In denying the permit, the Park Service relied on its authority, as conveyed to McFarland in prior correspondence, to protect park resources and to provide for visitor enjoyment of those resources. AR at 56. The prior correspondence referenced in the permit denial and the remainder of the administrative record provide ample evidence to support the Park Service's decision. In particular, in an email message informing McFarland of the Park Service's policy decision to close roads to inholders at the same time they are closed to the general public, ranger Scott Emmerich explained the decision was made to protect wildlife and public recreation values. AR at 36. In a December 17, 1999 letter to McFarland explaining that any request for a special use permit would likely be denied, Assistant Superintendent Charles Farabee, Jr. explained the decision to close the road to vehicles and snowmobiles was based on public safety, resource protection, and the avoidance

of conflict among visitor use activities. AR at 38. Farabee further explained exceptions would not be made for inholders unless access rights were clearly stated in a deed or right-of-way easement. AR at 38-39. The letter referenced the 1975 decision, made following completion of an Environmental Assessment and public comment period, to ban snowmobiles. AR at 39. The letter also referenced the 1985 Land Protection Plan, which, according to the letter, provides specific information about the resource values in the Big Prairie area. AR at 39. The referenced pages of the Land Protection Plan in turn discuss the critical wildlife habitat the Big Prairie area provides. AR at 281. These citations and the remainder of the administrative record provide ample support for the Park Service's decision.

Additionally, the Deputy Regional Director's failure to address McFarland's request for vehicular access in denying the administrative appeal does not render the Park Service's denial of the permit arbitrary and capricious. Deputy Regional Director Snyder refused to overturn the permit denial, observing snowmobile use in Big Prairie would create visitor use conflicts with cross country skiers and snowshoers seeking quiet and solitude and negatively impact grizzly bear, lynx, and gray wolf. Pl.'s Undisp. Facts Ex. 24. Snyder did not expressly discuss the effect of vehicular access. Nevertheless, it is clear from the original permit denial that vehicular access was denied for the same reasons snowmobile access was denied. Snyder's failure to explicitly set forth these

reasons in his letter denying the appeal does not render the Park Service's decision arbitrary and capricious.

Finally, the Park Service's failure to consider McFarland's claims to an easement does not require reversal of the agency's decision. The existence of an easement along a road is arguably a factor the Park Service should consider in determining whether to grant the alleged easement-holder a special use permit to access the road. Cf. Fitzgerald, 460 F3d at 1263-64 (noting existence of a common law easement is relevant to determination of whether proposed Federal Land Policy Management Act easement is reasonable). In fact, the Park Service recognized as much in this case when it noted in denying McFarland's permit request that a thorough legal review of McFarland's easement claim was being conducted by the Department of the Interior Solicitors Office. AR t [sic] 56. McFarland, however, did not await the outcome of this review before filing suit. In any event, because this Court has determined McFarland does not possess an easement along Glacier Route 7, the Park Service's failure to consider the existence of an easement in denying the permit does not render its decision arbitrary and capricious.

3. Road Closure Regulations

McFarland finally argues denial of the permit was contrary to law because it violated Park Service regulations. McFarland cites 36 C.F.R. § 1.5(b), which

requires any "closure, designation, use or activity restriction or condition . . . that will result in significant alteration in the public use pattern of the park area . . . to be published as rulemaking in the Federal Register." McFarland argues the 1989 and 1999 Compendiums, which provide for the closure of all Park roads seasonally by snow, are invalid because they were not subject to required rulemaking procedures in accordance with this regulatory provision. McFarland's challenge to the 1989 and 1999 Compendiums, however, represents an entirely new APA claim not pled in his Amended Complaint. McFarland's Amended Complaint challenges the denial of his application for a special use permit; it does state a claim challenging the Park Service's failure to follow proper rulemaking procedures in issuing the Compendiums. McFarland cannot assert this claim at this late date. See Pickern v. Pier 1 Imports, Inc., 457 F.3d 963, 968-69 (9th Cir. 2006). Because McFarland has not demonstrated the Park Service's denial of his request for a special use permit was arbitrary, capricious, an abuse of discretion, or contrary to law, Defendants are entitled to summary judgment on McFarland's APA claim.

IV. Conclusion

Accordingly, IT IS HEREBY ORDERED that Defendants' Motion for Summary Judgment (dkt #140) is GRANTED. Plaintiff's Motion for Summary Judgment (dkt #134) is DENIED.

Dated this 17th day of November, 2006.

/s/ [Illegible]
DONALD W. MALLOY,
Chief Judge
United States District Court

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOHN JAMES MCFARLAND,
Plaintiff-Appellant,

v.

GALE A. NORTON, in her capacity as Secretary of the Department of the Interior; JOHN F. SHIREMAN, in his capacity as Acting Superintendent of Glacier National Park; UNITED STATES OF AMERICA; NATIONAL PARK SERVICE,
Defendants-Appellees,

NATIONAL PARKS CONSERVATION ASSOCIATION,
Defendant-Intervenor-Appellee.

No. 03-35831

D.C. No.
CV-00-00020-DWM

OPINION

Appeal from the United States District Court
for the District of Montana
Donald W. Molloy, District Judge, Presiding

Argued and Submitted
February 10, 2005 – Seattle, Washington

Filed October 11, 2005

Before: Monroe G. McKay,* Diarmuid F. O'Scannlain, and Carlos T. Bea, Circuit Judges.

Opinion by Judge O'Scannlain

COUNSEL

Alison Roberts, Lakewood, Colorado, argued the cause for the appellant; Kelly S. Hall and William Perry Pendley, Mountain States Legal Foundation, Lakewood, Colorado, were on the briefs.

Todd S. Kim, Washington, D.C., argued the cause for the appellees; Kelly A. Johnson, Acting Assistant Attorney General, William W. Mercer, United States Attorney, Kris A. McLean, James C. Kilbourne, and Todd S. Kim, United States Department of Justice, Washington, D.C., and Gary Moore, United States Department of the Interior, Washington, D.C., were on the brief for the federal appellees. Alan J. Pemberton, Vijay Shanker, and Emily S. Williams, Washington, D.C., were on the brief for appellee National Parks Conservation Association.

OPINION

O'SCANNLAIN, Circuit Judge:

We are asked to decide whether a landowner can prove that he has an easement over a federally-owned road to his property within Glacier National Park in

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* The Honorable Monroe G. McKay, Senior United States Circuit Judge for the Tenth Circuit, sitting by designation.

Montana and whether the National Park Service arbitrarily and capriciously denied his request for a special use permit to use the road during the winter time.

I

In 1916, Charles F.W. Schoenberger received title under the Homestead Act to an 89-acre parcel in Montana. The parcel was within the boundaries of the Glacier National Park and was used as a year-round subsistence homestead. In 1984, John James McFarland purchased a 2.75-acre portion of Schoenberger's land. McFarland's portion, and, indeed, the entirety of the original Schoenberger homestead, is accessible via a road, in existence since 1901, known within Glacier National Park as the North Fork Road, the Inner North Fork Road, or Glacier Route 7. The National Park Service owns and maintains Glacier Route 7, a portion of which, beginning at the Polebridge Ranger Station and running north 3 miles, provides the only vehicular access to the original Schoenberger homestead, including McFarland's portion of it. Another possible means of access is across the North Fork of the Flathead River, which borders one side of McFarland's property and is the Park boundary. A county road runs along the other bank of the North Fork, outside the park boundaries.

McFarland's grandparents and others lived year-round on Schoenberger homestead parcels into the 1960s. The Park Service snow-plowed Glacier Route 7

past the Polebridge Ranger Station until the 1950s.[1] For a time thereafter, year-round residents on the Schoenberger homestead cooperated to plow the road themselves.

In 1975, the Park Service banned snowmobiling within Glacier National Park, including along Glacier Route 7. For some time the Park Service has closed Glacier Route 7 to winter public vehicular access, having published such policy in official documents since 1987 and announced it to local media since 1988. At some point in the 1970s, the Park Service began to put up wooden barriers at the Polebridge Ranger Station, though land owners were allowed to move them aside for access. In 1976, the Park Service replaced the wooden barriers with a locked cable strung across the road but would unlock the cable at the request of property owners so that they could access their property in the winter. Later a double lock system was installed, in which landowners had access to the road when it was passable after it was closed to the public.

In the fall of 1999, McFarland informed the Park Service that he and his wife and three daughters intended to live at their home on the Schoenberger homestead year-round. On December 8, 1999, the Park Service informed McFarland that "a policy decision has been made that no one will drive park

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[1] The Polebridge Ranger Station is in operation year round and the road up to that point is plowed.

roads once they are closed to the public." The Park Service went on to say that "[o]nce we close the gate at Polebridge for the winter, it will remain closed until the road is safely passable to the public again." The Park Service concurrently changed the lock system, denying access.

On January 6, 2000, McFarland filed a special use permit application with the Park Service for motorized access to his home on Glacier Route 7. In that application, McFarland explicitly claimed that he owned an easement and requested permission to "unlock the gate [at the Polebridge Ranger Station] and gain access to [his] property at any time without further assistance from Park Service personnel." As a fallback position, or in "the event the road conditions make it unsafe or unpractical to drive," McFarland sought the right to use a snowmobile between his home and the Polebridge Ranger Station. McFarland sought the same rights of access for guests.

On January 24, 2000, the Park Service denied McFarland's application. McFarland and his family then moved from their Glacier National Park residence because, he testified, they were left with no reasonable means of access. On March 14, 2000, McFarland appealed within the agency. On April 21, 2000, the Park Service denied his administrative appeal.

In due course, McFarland filed suit (1) to quiet title to an easement over Glacier Route 7 under the

Quiet Title Act and, (2) to seek judicial review, pursuant to the Administrative Procedure Act ("APA"), of the decision by the Park Service denying him a special use permit.

McFarland and the government each moved for summary judgment and the government also moved to dismiss, which latter motion the district court granted. The district court found that the landowners generally had access to their property until 1999 and that McFarland had personally never been denied access until that year. The district court nonetheless held that McFarland's action to quiet title ran afoul of the statute of limitations, since his action accrued in 1976 when property holders had to start requesting the Park Service to open the gate during the winter. The district court rejected the APA claim on the ground that it was just an attempt to quiet title by another means. The district court denied McFarland's and the Park Service's summary judgment motions as moot. McFarland timely appeals.

II

[1] McFarland filed suit on February 2, 2000, under the Quiet Title Act, 28 U.S.C. § 2409a, which contains a 12-year statute of limitations. 28 U.S.C. § 2409a(g). Therefore, McFarland's attempts to quiet title, either through the Quiet Title Act or through the APA, would be rightly dismissed if he knew or should have known of the United States' adverse claim by February 2, 1988.

[2] If McFarland were asserting fee title to Glacier Route 7, "notice of a government claim that create[d] even a cloud on that title may be sufficient to trigger the limitations period." *Michel v. United States,* 65 F.3d 130, 132 (9th Cir. 1995) (citing *California v. Yuba Goldfields,* 752 F.2d 393, 394-97 (9th Cir. 1985)). An easement, of course, is different. The government's claim to ownership and control of the servient tenement can be entirely consistent with private ownership of an easement. *Id.* Because McFarland claims title to an easement, his action accrued only when he or his predecessors-in-interest "knew or should have known the government claimed the exclusive right to deny their historic access" to Glacier Route 7. *Id.*

[3] The government, in its capacity as the owner of the servient tenement, has the right to reasonable use of its land, and its rights and the rights of easement owners are "mutually limiting," though of course "easements are burdensome by their very nature, and the fact that a given use imposes a hardship upon the servient owner does not, in itself, render that use unreasonable or unnecessary." *Tooker v. Feinstein,* 886 P.2d 1051, 1053 (Or. Ct. App. 1994); *see also* Restatement (Third) of Property (Servitudes) § 4.9 (2000). It follows that mild interference with the use of an easement pursuant to the government's own property interests will not start the statute of limitations running.

The situation is more complicated where, as here, the landowner could reasonably presume that the

federal entity concerned has the power to regulate. *See, e.g.,* 16 U.S.C. § 3 ("The Secretary of the Interior shall make and publish such rules and regulations as he may deem necessary or proper for the use and management of the parks. . . ."); *Lesoeur v. United States,* 21 F.3d 965, 968 (9th Cir. 1994) (acknowledging that Congress has given the Secretary "a great deal of discretion in promulgating and enforcing regulations for use of the national parks."). This can make it difficult to distinguish reasonable regulations that happen to restrict use of the easement from actions taken incident to the government's claim of exclusive ownership. To avoid forcing landowners and the government into "premature, and often unnecessary, suits," *Michel,* 65 F.3d at 132, we should not lightly assume that regulatory or supervisory actions, as opposed to those that deny the easement's existence, will trigger the statute of limitations. Were it not so, any regulation of a property interest would challenge ownership of the interest itself.

[4] We are satisfied that the 1975 general ban on snowmobile use within the boundaries of Glacier National Park[2] did not constitute notice to McFarland that the Park Service claimed exclusive ownership over Glacier Route 7. It is true that McFarland knew or should have known about it, since the record shows that the ban was a topic of conversation among

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[2] We assume, as seems likely, that McFarland knew or should have known of the ban before February 2, 1988.

landowners. Nevertheless, the snowmobile ban was a generally applicable regulation which did not affect plowing of Glacier Route 7, the historic means of facilitating winter access.

[5] Nor did the installation of barriers, cables with locks in 1976, and later gates with locks, give notice to McFarland that the Park Service claimed exclusive ownership over the road. Ordinarily the owner of the land over which an easement runs has the right to erect gates across the easement if they do not interfere unreasonably with the easement owner's right of passage. *See, e.g., United States v. Johnson,* 4 F. Supp. 77, 79 (W.D. Wash. 1933) (holding that "gates at termini" do not preclude the "free, full, and quiet enjoyment" of an easement). This is especially true where the gate ensures that only those with a right to use an easement can access it. *See id.; Lovitt v. Robideaux,* 78 P.3d 389, 395-96 (Idaho 2003). Unless the installation of gates is coupled with a denial of access, there is no easement infringement.

No landowner was denied access through the gates and barriers when the road was passable until well after February 2, 1988. Nor, prior to that date, was a landowner refused permission to plow the road or to drive it down.[3] McFarland states that he always

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[3] A procedure described in the record, in which a truck or other vehicle is repeatedly driven up and down the road after a snow, packing the snow down and keeping the road somewhat passable.

had access whenever he wanted it up until 1999, with the exception of an incident in which another landowner, Paul Snyder, found that the second lock was locked while the road was still passable, after which a key to it was also provided. Scott Emmerich, an official for the Park Service, testified that landowners were allowed access while the road was passable. Another Park Service official has also asserted that, for at least a period in the 1990s, the Park Service allowed private landowners to drive the road after it was closed to the public "until the snow became too deep."

[6] There are no instances in the record until 1999 of Park Service refusal to unlock the gates when landowners asked. Emmerich insists that he would not have unlocked the gate after the road became impassable but admits that no one ever asked. Even if some landowners were denied access, it does not follow that McFarland knew or should have known. McFarland's own testimony is that he was given access every time he asked and that the latest he sought access was "through New Year's" and the earliest was "in April." McFarland testified that he understood his neighbors to have been given the same degree of access. And even assuming that McFarland knew or should have known about these instances, they would not necessarily have been sufficient to begin the statute of limitations. Barring access to impassable roads – as opposed to denying permission to make the roads passable through plowing or driving down – is well within the government's concern

for safety in the use of the easement and need not be construed as a denial of the easement.

[7] Because McFarland was not denied year-round access when he desired it until 1999, he did not know nor should he have known that the government disputed his claim to an easement. The statute of limitations did not run and McFarland is entitled to pursue his Quiet Title Act claims in district court on remand.[4]

III

[8] In his Quiet Title Act action, McFarland offers three different theories under which he owns an easement of access. First, he argues that his predecessors-in-interest were expressly granted an easement, because land patents issued under the Homestead Act conveyed the land "with the appurtenances thereof," citing *Hunter v. United States,* 388 F.2d 148, 154 (9th Cir. 1967) (explaining that "an appurtenance . . . is that which is essential to the use of the right granted"). Second, he argues that his predecessors-in-interest were granted an easement by implication, since easements of access would generally be necessary to fulfill the Homestead Act's purposes of encouraging the settlement of the vast

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[4] Nor should the district court have dismissed McFarland's claims under the APA on the grounds that they were an end run around the statute of limitations. McFarland is also entitled to pursue his APA claims on remand.

frontier. Finally, he argues that he has an easement under the doctrine of easement by necessity. The district court did not rule on the merits of these claims. Since the factual basis of these claims is incomplete in the record, summary judgment at this stage would be inappropriate. *See Jones-Hamilton Co. v. Beazer Materials & Services, Inc.*, 973 F.2d 688, 694 n.2 (9th Cir. 1992) ("[W]e may review a denial of summary judgment . . . *where the record has been sufficiently developed to support meaningful review of the denied motion.*" (emphasis added)). McFarland is entitled to pursue all these claims on remand.

IV

McFarland brought his action to quiet title well within the 12-year statute of limitations. The dismissal of his claim is reversed and this case is remanded to the district court for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

JOHN JAMES McFARLAND

Plaintiff,

vs.

GALE A. NORTON *in her capacity as Secretary of the Department of the Interior;* **SUZANNE LEWIS**, *in her capacity as Superintendent of Glacier National Park*,

Defendants,

NATIONAL PARKS CONSERVATION ASSOCIATION,

Defendant-Intervenor.

CV-00-20-M-DWM

ORDER

(Filed Jul. 9, 2003)

There are three motions pending in this case: (1) Defendants' Motion to Dismiss for Lack of Subject Matter Jurisdiction; (2) Defendants' Motion for Summary Judgment; and (3) Plaintiff's Cross-Motion for Summary Judgment. The first is granted, the second and third are not dealt with because there is no jurisdiction to hear the case.

FACTUAL BACKGROUND

Plaintiff John James McFarland and his sister presently owns certain private property ("Property") within the boundaries of Glacier National Park ("Park"). The Property in question is located approximately 3.2 miles North of the Polebridge Ranger Station ("Station") in an area of the North Fork described as Big Prairie. In 1984, they purchased the inholding Property from their grandmother, Mary McFarland. The owners of the Property can trace their purchase back to Charles F. W. Schoenberger, who originally purchased the property in 1916 pursuant to the Homestead Act of 1862.

In February of 1897, President Glover [sic] Cleveland, by presidential proclamation, created the Lewis and Clark Reserve. Within the Reserve, President Cleveland placed all of the lands that would ultimately become the Park. These lands remained reserved for public use until 1906, when certain portions were reopened for homesteading. It was during this time that Schoenberger purchased the Property. As of June 11, 1906, 44 homestead claims had been filed in the Reserve region of Glacier National Park. Presently, there are approximately 80 inholders and 100 inholder parcels in Glacier National Park.

In 1901, in order to access a mining claim, the Butte Oil Company constructed an access road from the foot of Lake McDonald in to Kintla Lake. This road runs 40 miles northward and is commonly

known as Glacier Route, Flathead River Road, or the Inner Fork Road ("Route 7"). Route 7 runs through Big Prairie and provides road access to the Property.

In 1910, Congress passed the Glacier Park Act, which provided in relevant part:

> [T]hat nothing herein contained shall affect any valid existing claim, location, or entry existing under the land laws of the United states before May 11, 1910 or the rights of any such claimant, locator, or entry man to full use and enjoyment of his land. . . . 16 U.S.C. § 161.

In September of 1975, the National Park Service published an Environmental Assessment and Finding of No Significant Impact that banned snowmobiling within the Park. In 1985, the Park Service adopted a Land Protection Plan ("Plan") which, in relevant part and among others, reclassified the Property as a "seasonal residence." In August of 1993, the Park Service provided the Plaintiff with a copy of the Plan and informed him that to change Property use from seasonal to year-round would require prior approval.

Beginning in the mid 1970s, during the winter months, the Park Service began placing wooden barriers that prevented motorized access on Route 7 north of the Station. Property owners were allowed to move the barriers to access their property even though Route 7 was still closed to the general public. Sometime in 1976, the Park Service replaced the wooden barrier with a cable and lock. However, the

Park Service would unlock the cable at the request of the property owners who wished to access their properties during the winter. In late 1988, the Park Service installed a permanent gate at the Station. The gate eventually contained a double-lock system whereby the Park Service and the inholders in the Big Prairie area could have motorized access to Route 7 when the road was closed. Except for this road, there is no other motorized road access to Big Prairie.

This was generally the state of the road access to Big Prairie until sometime in 1999 when the Park Service removed the inholder's lock at the Station gate. In December 1999, the Park Service issued a new policy decision "that no one will drive park roads once they are closed to the public. . . . Once we close the gate at Polebridge for the winter, it will remain closed until the road is safely passable to the public again." In support of the decision, the Park Service cited 36 C.F.R. 1.5(a)(1) which, in relevant part, allows the "[S]uperintendant's [sic] authority to close all or a portion of a park area to a specific use or activity. . . ." Prior to this new policy, Plaintiff had never been denied access to his Property whenever he wished it. The National Park Service admits that the policy in question has changed property owner access rights to private property during the winter.

During the Winter of 1999-2000, Plaintiff McFarland and his family decided to winter in Big Prairie. On January 6, 2000, upon notice of the new policy decision, Plaintiff McFarland applied for a special use permit seeking:

1. the right to use a vehicle to drive the 3.2 mile distance between [Plaintiff's] home and the Polebridge Ranger Station at such times as the National Park service has otherwise closed [Route 7] to public access by vehicle;

2. the right to unlock the gate at the station to gain access to [his home] at any time without further assistance from National Park Service personnel;

3. the right to use a snowmobile for the limited purpose of traveling the short distance to [his] home in the event that road conditions make it unsafe or unpractical to drive; and

4. that these rights also be reserved for his guests.

On January 24, 2000, the National Park Service issued a decision in response to Plaintiff's permit application. They allowed Plaintiff to keep a snowmobile on the Property to be solely used for medical emergencies and denied the remainder of Plaintiff's application. In light of the Park Services decision, Plaintiff McFarland and his family left their Big Prairie residence in early Winter of 2000.

MOTION TO DISMISS

1. **PROCEDURAL STANDARD**

Subject Matter Jurisdiction

A motion to dismiss under Fed.R.Civ.P. 12(b)(1) addresses the court's subject matter jurisdiction, derived from the case or controversy clause of Article

III of the U.S. Constitution. As federal courts are limited in jurisdiction, it is presumed that a case lies outside the jurisdiction of the federal courts unless the plaintiff proves otherwise. Kokkonen v. Guardian Life Ins. Co. of America, 511 U.S. 375, 376 (1994); Thornhill Publishing Co. v. General Telephone & Electronics Corp., 594 F.2d 730, 733 (9th Cir.1979). A 12(b)(1) motion can either challenge the sufficiency of the pleadings to support subject matter jurisdiction (a facial challenge), or it can challenge the actual existence of jurisdiction (a factual attack). In the latter case, the Court may consider evidence outside evidence and resolve factual disputes. Berardinelli v. Castle & Cooke, Inc., 587 F.2d 37, 39 (9th Cir. 1978; *See also*, Augustine v. United States, 704 F.2d 1074, 1077 (9th Cir. 1983). When a motion to dismiss is based on the running of the statute of limitations, it can be granted only if the assertions of the complaint, read with the required liberality, would not permit the plaintiff to prove that the statute was tolled. Jablon v. Dean Witter & Co., 614 F.2d 677, 682 (9th Cir.1980).

2. DISCUSSION

Defendants and Defendant-Intervenor ("Defendants") have filed this Motion to Dismiss for lack of subject-matter jurisdiction on the grounds that the Plaintiff is time-barred from bringing his causes of action. They contend that all of Plaintiff's causes of action fall under 28 U.S.C. § 1346(f) of the Quiet Title Act ("QTA"). Through the QTA, Congress has

consented, with certain exceptions, to the waiver of sovereign immunity and allow the United States to be named as a party-defendant in a civil action "to adjudicate a disputed title to real property in which the United States claims an interest, other than a security interest or water rights." 28 U.S.C. § 2409(a). The Plaintiff does not dispute that his causes of action fall within the QTA, rather, he argues that his claims are not time-barred.

Defendants argue that Plaintiff's claim is barred by the 12-year statue [sic] of limitations of the QTA. 28 U.S.C. § 2409a(g). This is a jurisdictional prerequisite to be strictly construed in favor of the sovereign. Block v. North Dakota, 461 U.S. 273, 292 (1983). While the Supreme Court in Block indicated that the statutes waiving immunity should not be construed in an unduly restrictive manner, it cautioned that these statutes could not be interpreted in such a manner as to "extend the waiver beyond that which Congress intended." 461 U.S. at 287. Under 28 U.S.C. § 2409a(g), a claim accrues on the date that the plaintiff or his predecessor in interest "knew or should have known of the claim of the United States." The merits of a quiet title claim are irrelevant to the operation of the limitations bar. Government of Guam v. United States, 744 F.2d 699, 701 (9th Cir.1984). Plaintiff filed his present suit in February of 2000. Therefore, he must establish that he did not have constructive notice of the United States' interest in the section of Route 7 at issue until after February of 1988.

Plaintiff contends that the statute of limitations did not begin to run until the Winter of 1999 when Defendant Park Service denied his access to Route 7 north of the Station. Further, Plaintiff argues that, even if the United States expressed an interest in Route 7 north of the Station, the United States' subsequent acts of "ownership" did not provide constructive notice that the Government's interest was adverse to Plaintiff's interest in use of that portion of Route 7 during the winter months. *See* Michel v. United States, 65 F.3d 130, 132 (9th Cir.1995). Rather, Plaintiff contends that his action accrues when the government, "adversely to the interest of plaintiffs, denie[s] or limit[s] the use of the roadway for access to plaintiffs' property." Id., (*citing* Werner v. Untied [sic] states, 9 F.3d 1514, 1516 (11th Cir. 1993)).

This Circuit has explicitly rejected Plaintiff's contention that a cause of action accrues and the statute of limitations begins to run only when the United States acts in a manner openly hostile and adverse to a landowner's interest. California v. Yuba Goldfields, Inc., 752 F.2d 393, 395 n. 1 (9th Cir. 1985) (*cert. denied*, 474 U.S. 1005 (1985)) "The sufficiency of actual and open possession of property is to be judged in the light of its character and location." United States v. Fullard-Leo, 331 U.S. 256, 279 (1947). In Park County v. United States, the Ninth Circuit held that a posted sign "put [the appellants] on notice that the United States claimed control over at least a substantial portion of the right-of-way. This claim

should have put the appellants on constructive notice and alerted them to make reasonable inquiry as to the remainder of the purported right-of-way." 626 F.2d 718 (9th Cir.1980) (cert. denied, 449 U.S. 1112 (1981)). Here, McFarland and his predecessors "knew or should have known the government claimed the exclusive right" to the use of the portion of Route 7 at issue and to deny access to others at its discretion. Michel, 65 F.3d at 132. Even if the United States did not avail itself of the opportunity to deny all access to Route 7 north of the Station, there were significant acts, sufficient to place Plaintiff and his predecessors on notice, that any non-possessory interest they allegedly had to Route 7 was in jeopardy.

In 1975, the Park Service began to ban the use of snowmobiles unless a special use permit was granted. Prior to the Plaintiff's purchase of the Property in 1984, the Park Service had put up wooden barriers in the mid 1970s to prevent access to Route 7 beyond the Station during the winter months. By 1976, the Park Service had replaced the wooden barriers with a cable that would be unlocked by the Park Service at the property owner's request in order to allow them motorized access to their property during the winter months. From at least 1976, when Plaintiff's predecessors had to ask the Park Service to unlock the cable at the Station in order for them to access their property, they were on notice of the Defendants' interest in Route 7. Hence, Plaintiff's causes of action accrued in 1976. Consequently, Plaintiff's causes of

actions are time-barred by the QTA. Defendants' Motion to Dismiss is GRANTED with prejudice.

CONCLUSION

Therefore, for the foregoing reasons, IT IS HEREBY ORDERED that,

1. Defendants' Motion to Dismiss (*Doc. # 71*) is GRANTED with prejudice.
2. Defendants' Motion for Summary Judgment (*Doc # 72*) is DENIED as moot.
3. Plaintiff's Motion for Summary Judgment (*Doc. # 76*) is DENIED as moot.

The Clerk of Court is directed to notify the parties of the entry of this Order and to dismiss Plaintiff's claims with prejudice.

Dated this 8th day of July, 2003.

/s/ [Illegible]
DONALD W. MOLLOY,
CHIEF JUDGE
UNITED STATES
DISTRICT COURT

HISTORIC RESOURCES STUDY, GLACIER NATIONAL PARK AND HISTORIC STRUCTURES SURVEY

[August 1980]

Alan S. Newell, Project Director

David Walter, Principal Investigator (History)

James R. McDonald, Principal Investigator (Architecture)

* * *

The creation of the "Flathead River Road," in 1901, marked the next district of the Glacier area opened to travel, if only by primitive and seasonal means. The construction of this road – stretching from the foot of Lake McDonald north to parallel the North Fork of the Flathead River, to the foot of Lower Kintla Lake – was prompted by potential mineral deposits. Much as the initial wagon roads into East Side valleys were located by prospectors during the 1890s and early 1900s, oil developers believed a significant pool of crude existed at the head of Lower Kintla Lake to merit drilling a test well. Thus a road into the North Fork became necessary to convey the heavy drilling equipment from the Belton station to the well site.

The Kintla Lake oil project was controlled by a group of businessmen based in Butte, Montana. Early in the Summer of 1901, their crew commenced clearing a narrow wagon-path over McGee Hill and the

succession of North Fork ridges. During the subsequent autumn, the men hauled drilling equipment to the foot of Kintla Lake – although the clearing crew had left stumps in the right-of-way, attempted no grading, and constructed no creek bridges. In 1902 the competitive Kintla Oil Company used the same road to transport its equipment to a drilling site beside the North Fork River, just below the mouth of Kintla Creek.

By 1905 both of these speculative oil ventures had proved unproductive. Yet an approach to the North Fork area was established. With the opening of the valley to legal homesteading in 1906, the "Flathead River Road" would provide access to venturesome subsistence settlers – an access situated completely within the subsequent boundaries of the Glacier National Park. Furthermore, this "Inside Road" established the long-lived possibility of a North Fork loop road, using either the Akamina or the South Kootenai Pass, to link Lake McDonald with Cameron and Waterton Lakes.

The Great Northern's mainline initiated access to the Glacier region in 1892. Still the development of local travel routes depended upon several factors: (1) the attraction of tourists to the Lower Lake McDonald Valley, and the accommodation of those visitors; (2) the advent of early mineral exploration within the East Slope valleys; (3) the prospect of oil exploitation in the Upper North Fork Valley.

Simultaneously, however, an improved trail system evolved in the Glacier region. Although this system remained secondary to a dependence upon the wagon-road routes, it established a basic network of feasible trails that, subsequently, offered potential road-route development. The trails in Glacier, used by various Indian bands, formed the structure of a complex for foot and horseback travel. Prior to 1910, the U.S. Forest Service was responsible for the greatest expansion of this system – a system that rapidly would gain the Glacier National Park the nickname of "The Trails Park."

* * *

NORTH FORK OF THE FLATHEAD AREA: History of Private Development, 1889-1975

The history of private development within the valley of the North Fork of the Flathead River, from its crossing of the Canadian Boundary to its confluence with the Middle Fork, is tied directly to the question of administrative jurisdiction. The area's settlement, the nature and the commercial pursuits of its settlers, and the subsequent, restricted development all depend on governmental legislation applicable to the sector.

For instance, the pertinent area received some formal, if passive, federal jurisdiction with the creation (1864) of Montana Territory. Subsequently it was included (1889) in the State of Montana. More

important, the area fell (1897) within the Lewis and Clark Forest Reserve and then (1908) within the Blackfeet National Forest, administered from Kalispell by the U.S. Department of Agriculture. From Blackfeet Forest land, Glacier National Park was created (1910).

Prior to white penetration of the North Fork Valley, Salish, Kootenai, Stoney, and various Blackfoot Confederacy bands of Indians used it as a natural approach to the Akamina or South Kootenai Passes. Some white trappers, explorers, surveyors, and adventurers also visited the area during the nineteenth century – most notably the Northwest Boundary Survey team (1860). However, concerted white settlement of the Valley was a belated result of the construction (1891-1892) of the Great Northern Railway tracks west of Midvale (East Glacier), through Belton (West Glacier) and Columbia Falls, to Kalispell. During the 1890s, substantial coal deposits were located immediately west of the North Fork River, and oil seepages were discovered in the upper Valley. Yet these finds were unexploitable without access to the Railway's lines.

Thus the initial access to the North Fork Valley was a wagon-trail crudely hacked (1901) from the forests between Apgar and the foot of Lower Kintla Lake. This wagon-trail was constructed by the Butte Oil company to transport drilling equipment to its Kintla Lake site, but it quickly proved an access route for adventurous homesteaders. Between 1901 and 1910, scores of homestead claims were filed on land

throughout the Valley – especially after passage of the Forest Homestead Act (June 11, 1906).

These early claims tended to lie east of the North Fork, because of the road access and the location of large meadows on this side of the river. Indicative of this type of settlement are the Gephart homestead (1906) on McGee Meadow, the Cummings claim (1908) on Quartz Creek, and the Schoenberger (1906) and Johnnie Walsh (1906) places on Big Prairie. In contrast to the areas at either ends of Lake McDonald, visitor-accommodation activities were minimal in the North Fork Valley between 1901 and 1910 – Bill Adair's small "hotel" in Sullivan's Meadow being the single exception. Rather, this was a sector of subsistence homesteading, in which the residents combined farming, hunting, and trapping with occasional quick-income jobs, outside the Valley. The extended-family settlement pattern also pertained to this area, but to a lesser degree than in the Lower Lake McDonald sector; a number of single men homesteaded the North Fork prior to 1910.

Between 1901 and 1910, the Valley of the North Fork of the Flathead River seemed on the verge of economic development. Speculation abounded regarding the extraction of oil, coal, and timber, and the area seemed well-suited for fishing and hunting parties. The original (1901) North Fork Road was extended beyond the Kintla Lake turn-off, into Canada. Indeed, in 1909, both the Milwaukee Road and the Great Northern surveyed right-of-ways paralleling the river, in anticipation of such profitable

commercial ventures. One clause in Glacier Park's enabling legislation permits the construction of such a rail line within the Park's boundaries. However, prior to the 1970s development of the Cabin Creek coal site, immediately north of the International Boundary in British Columbia, economic development of the North Fork has been restrained.

A government-jurisdiction change seriously affected the North Fork Valley in 1910. With the creation of Glacier National Park, additional private-land claims within the reserve – i.e., on the east side of the river – were disallowed. Still, North Forkers had fought the inclusion of the eastern Valley in the Park and, as late as 1915, petitioned the Department of the Interior for a realignment of the Park's western boundary to the east, along the foot of the Livingston Range. Nevertheless, in 1910, title-holders and pending-claimants became "inholders" who – by a clause in the enabling legislation precipitated by North Forkers' protests – were permitted to retain their land. The immediate effect of the creation of Glacier National Park on the North Fork Valley was that subsequent homesteading, particularly during the 1910-1920 period, was restricted to the west side of the Valley, on what was then Blackfeet National Forest land.

The height of settlement in the North Fork Valley occurred during this 1910-1920 period. Estimates place the population as high as 350 persons on more than 100 properties between Howe Ridge and the Canadian Boundary. This influx prompted the

citizens of Columbia Falls – in conjunction with North Fork residents and the Forest Service – to construct (1913-1916) a road on the west side of the river, from Columbia Falls into Canada. The additional road access permitted the extraction of the Valley's west-side natural resources, particularly timber and coal. Yet the prime activity of the Valley remained subsistence homesteading, with some seasonal work in the Glacier Park visitor-enclaves or in the Flathead Valley.

Only during the 1920s did the North Fork begin to develop visitor-accommodation facilities of note. This delay is attributable primarily to the lack of adequate roads. Larson's Fishing Camp, on the lower North Fork, the Culver Military Academy's cabin complex on Bowman Lake, and Brill's Guest Ranch, on the upper river, are indicative of such commercial enterprises. This activity was continued with H. Frank Evans' Wilderness Trail Trips (1946-1953) and Jack McFarland's dude ranch (1950-1970), both of which headquartered in the North Fork. Because of the Valley's relative inaccessibility, however, it never has been a site of heavy visitor travel, in contrast to the two Lake McDonald sectors.

Since 1930 the permanent population of the North Fork has declined. Homesteaders' children almost invariably left the Valley, although some of them returned during the Great Depression to weather the difficult, economic times. After World War II, however, the character of the Valley changed somewhat, to one of summer-cabin residency. Most of

the summer-cabin inhabitancy has occurred on the west side of the river, as the Park Service has followed a policy of purchasing former homesteads, on the east side, when funds permit. Such is the case with the Charles Green properties on the lower North Fork, with the Con Robinson piece on Big Prairie, and with the "Havreville" cabin subdivision, a portion of the original Johnnie Walsh homestead, north of Polebridge.

Several post-World War II developments carry the potential of significantly altering the character of the North Fork's settlement patterns. Although now apparently quieted, the U.S. Army Corps of Engineers' recurring plan to construct a dam on the North Fork would change the Valley dramatically. Glacier National Park constructed (1964-1966) the Camas Creek Road (Glacier Route #8) to forestall such an inundation. Yet this road could provide a Park Service connection to the long-advocated "Northern Loop" highway, linking Columbia Falls/West Glacier with Waterton Lakes National Park, via the North Fork Valley and Akamina Pass. The construction of such a highway would increase immediately visitation to the Valley.

The announced development (1973) of a coal-stripping operation immediately north of the Canadian Boundary, on Cabin Creek, introduces a third factor capable of changing the character of the Valley. Such a development could encourage similar operations downriver; it definitely would increase access to

the Valley from the north. In addition, the designation (1977) of the North Fork of the Flathead River under the Wild and Scenic Rivers Act portends not only an increase in visitation, but also a change in the *type* of person seasonally entering the Valley. Finally, the recent (1976ff.) Rocky Mountain Pine Beetle infestation in the North Fork promises to alter the character of the Valley. Whereas much of the dead timber will be removed from the land west of the river, the Park Service plans no such removal program. The opportunity for a devastating forest fire is obvious.

Unlike either of the Lake McDonald sectors and the East Side sector, the North Fork Valley represents a distinct settlement pattern of subsistence homesteading. The potential for the development of other activities – such as mining, visitor-accommodation, lumbering, etc. – long has existed. Yet those activities remain largely unrealized. The homestead settlement pattern still dominates Valley development – refined in a summer-cottage variation.

* * *

HOMESTEADING ON THE NORTH FORK IN GLACIER NATIONAL PARK

Patricia Bick, Historian
Glacier National Park
October, 1986

[Images Of Log Cabins Omitted In Printing]

* * *

Historic Name: J. K. MILLER HOMESTEAD
HS-1382

Location: T36N; R21W; SE 1/4, NW 1/4, SE 1/4, Section 32.

Acreage: approximately 7.

UTM Reference: 11/5412500/696000

Ownership: National Park Service

Access: Located approximately 4 miles north of the Polebridge Ranger Station and ¼ mile to the east of Glacier Route #7, along an abandoned road. The homestead complex is situated upon a ca. 100' ridge.

Evaluation of Significance and Architectural Integrity: The J.K. Miller Homestead is an impressively well preserved historic homestead complex with an extraordinary degree of historic architectural integrity, despite its abandonment since the 1930's. The property meets criteria A and C for inclusion in the National Register of Historic Places. Miller, a judge from Columbia Falls and investor in the North Fork oil wells, possessed sufficient capital at the time of

settlement to hire local homesteaders to develop his country property at the north end of Big Prairie. He maintained residency during the summers and raised horses[1] and root crops for market. After retirement, the Millers lived at their homestead on the North Fork year-round well into the 1930s.[2]

Miller's homestead buildings exhibit the characteristic local construction patterns and use of locally procured materials. The design of the primary residence, built in 1909, is more akin to the second generation of construction on the North Fork (see Charlie Schoenberger and Johnnie Walsh Homesteads), and the large scale, fine detailing, and considerable number of windows likely reflect Miller's relatively greater wealth at the time of settlement. The residence had a number of unique features, such as transom glass set above the large, front windows and sawn lumber used for floor joists, floor boards, and roof planking. The sawn lumber was purchased as salvage from the Butte Oil Company's defunct oil rig and saw mill at Kintla Lake. The large, dovetail notched log privy at the site is remarkable for its craftsmanship and good preservation. Perhaps the most outstanding structure at the site is the enormous log barn, which was constructed without the use of any dimensioned lumber. The high degree of

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[1] DeSanto, Jerry, "Drilling at Kintla Lake: Montana's First Oil Well", Montana, The Magazine of Western History, Winter 1985.

[2] Polebridge Ranger Station Log, 1932.

craftsmanship and ingenuity exhibited by this structure lend it a high degree of architectural significance.

Historical Information: After residing for a time in Alaska, J.K. Miller established his law practice and was one of the earliest pioneer settlers of Columbia Falls.[3] He built one of the city's first brick business blocks in the early 1890's, before the Great Northern Railroad had reached the upper Flathead. All glass and hardware for the structure had to be freighted across the Blackfeet Indian Reservation by horse and wagon.[4]

Miller was one of the early promoters of the North Fork area at the turn of the century and was familiar with the country.[5] His daughter Mary married the North Fork packer and tour guide Josiah Rogers in about 1907. Mary died after her first winter on her husband's Camas Creek homestead, en route to the hospital on the rough North Fork Road, in June 1908.[6] J.K. Miller and his wife took up his homestead claim on the ridge overlooking Big Prairie in June of the next year. The house was finished during that summer.

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[3] Stout, Tom, Montana, Its History and Biography, American Historical Society, Chicago and New York, 1921, Vol. II, pp. 157-158.

[4] Columbian, March 3, 1893.

[5] 1901 report on Mineral prospects.

[6] Columbian, June 27, 1908.

J.K. Miller lived on the homestead during the summer months and returned to Columbia Falls for the winters, because, as Miller stated in his testimony for proof, "of the high snow and the distance of 36 miles to the nearest railroad or post office."[7] In 1911, he reported harvesting 15 tons of root vegetables, and 20 tons of hay, with an orchard of 227 apple trees and 25 cherry trees nearing production[8].

Miller enjoyed the life of a gentleman farmer on the North Fork. As an advocate for North Fork development and an able lawyer, Miller was able to assist other North Fork ranchers in their dealings with the Glacier Park administrators and by lobbying the Flathead County Commissioners for road and bridge improvements.

Chain of Title:

J.K. Miller: final certificate 1914

Robert W. Miller: 1921

Glacier National Oil Syndicate: 1921

Allen Nelson – Gardner Company: 1926

M. and J. Lamb: 1926

J. Arthur Lamb: 1931

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[7] National Archives. Case file #541201, Testimony of Claimant.

[8] National Archives, Case file #541201.

J. E. McFarland: 1945

John S. McFarland: 1947

Mary D. McFarland: 1958

U.S. Government: 1967

* * *

Historic Name: JACK REUTER HOMESTEAD HR-16

Location: T35N, R21W, SE 1/4, SE 1/4, SE 1/4, NE 1/4, Sec. 5.

Ownership: National Park Service

Access: The site is located on the edge of the small ridge about 100' above the 90 degree turn in Glacier Route #7 to the north of the Polebridge airport.

Evaluation of Significance and Architectural Integrity: Only ground depressions and a light scatter of historic debris mark the Jack Reuter Homestead site. Although Reuter was one of the earliest known white residents of the North Fork, the site possesses insufficient integrity to be considered for listing in the National Register of Historic Places.

Historical Information: Jack Reuter worked on Teddy Roosevelt's Badlands Ranch during the 1880's, prior to coming up to the North Fork area.[1] In 1893

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[1] Interviews with Mary Kickbusch, Dan Sullivan, Ace Powell, Jr., William Cusick and Dick Walsh.

he took a Preemption claim on a tract of land in T30N; R20W, portions of section 14 and 15, which is about two miles southeast of Columbia Falls at the base of Columbia Mountain.[2] By the late 1890's, however, Reuter had established himself in the North Fork area and a "Reuter cabin" appears on the 1898 map drawn by H. B. Ayers of the U.S. Geological Survey. Because the North Fork had been withdrawn from homestead entry as part of the Lewis and Clark Forest Reserve, Reuter simply squatted on the land until, in 1906, the area was reopened for homesteading. Reuter filed on his Big Prairie claim in 1908, declaring residency on that parcel since 1900. On the 1900 and the 1910 censuses, Reuter listed his occupation as "trapper and hunter." He also hauled freight for oil exploration outfits and U.S. Geological Survey teams.

Reuter was a large, strong man, and noted as a good cabin builder.[3] When Big Prairie started filling up with settlers around 1910, Reuter tried, with limited success, to flow with the times. He married Minnie Schoenberger, the daughter of Anton and sister of Charlie and Paul, but that didn't last long. Reuter apparently would lock Minnie in the cabin during days when he was away and prohibit her from visiting with neighbors.[4] He ended up throwing her out,

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[2] Columbian, Feb. 16, 1893; March 16, 1893.

[3] Interview with Ace Powell, Jr. by Cindy Mish, July 15, 1976.

[4] Interview with Mary Kickbusch by Cindy Mish, July 1981.

tossing her trunk and belongings behind, when he found her talking with a stranger one day.[5]

In 1915 when Reuter offered final proof on his homestead claim at age 58, he stated that he was a widower.[6] At that time, he also declared himself to be a rather successful homesteader with a new log house constructed with a board and shake roof, as well as his old 16' x 16' cabin; two log barns, one 32' x 32' and the other 16' x 28'; 2-¼ miles of fencing; 60 acres in timothy; 15 acres in grain; 20 head of cattle; 3 horses; and 2 dozen chickens. In 1918, Reuter built himself another new log house, which would have been at least his third residence.

Neighborhood relations on Big Prairie are portrayed by a story that ran in the Columbia Falls newspaper about a fracus over a missing cow. The county sheriff went up to the North Fork to investigate allegations by Jack Reuter that his neighbor Johnnie Walsh had stolen one of his animals. Walsh denied the charge and the sheriff clipped sufficient hair on the allegedly stolen cow to prove there was no Reuter brand on the animal. But the matter did not rest until Patrick Walsh, Johnnie's father, filed charges against Reuter for disturbing the peace. When these charges were dismissed, J. K. Miller, the local lawyer and gentleman farmer, initiated proceedings against Reuter,

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[5] Ibid.

[6] National Archives, Case file #541200, Testimony of Claimant.

claiming that he was insane.[7] After these charges were also dismissed, Jean Sullivan from down in Sullivan Meadow let it be known that he had Reuter's cow all along.[8]

Chain of Title:

John Reuter: final certificate 1915

Lawrence Fienstien: 1916

John Reuter: 1926

John E. Lewis: 1934

Nettie C. Lewis: 1936

U.S. Government: 1936

* * *

Historic Name: CHARLES BUHLER HOMESTEAD
HR-2

Location: T35N; R21W; E 1/2, SW 1/4 of Section 5

Ownership: National Park Service

Access: The Buhler property is accessed by either of two fishing access roads running to the west toward the river from Glacier route #7 to the south and north of the abandoned landing strip.

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[7] Columbian, June 19, 1919.

[8] Dick Walsh, personal communication, Sept. 21, 1986.

Evaluation of significance and Architectural Integrity: No standing structures remain on the Buhler Homestead claim. Presumably a number of Buhler's homestead structures were moved to the Finton Ranch (later Quarter Circle-MC Ranch) during the late 'teens or early 'twenties. All buildings and structures at the Finton Ranch were removed or burned during the late 1960s. The site does not qualify for listing in the National Register of Historic Places.

Historical Information: Charles Buhler established residency on his homestead claim in September, 1908 at age 21. A single man from Nebraska, Buhler ran trap lines during the winter months, tended his homestead during the summer, and worked for neighboring homesteader Judge J.K. Miller in developing Miller's property. In 1912, he commuted his claim to cash and gained title to the property. At that time he had built a 16' x 14' log house that had two windows, an 18' x 20' log stable, a 20' x 60' hay shed, an 8' x 8' log tool shed, a log root cellar and a log smoke house. His ¼ acre garden yielded 6 tons of rutabagas, carrots, turnip and beets in 1912. On the rocky, sandy river bottom he had 10 acres in timothy hay and another 20 acres broken and ready for planting[1]. Charles joined the army during World War I and never returned to the North Fork.[2]

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[1] National Archives, Case File #33098, Testimony of Claimant.

[2] Interview with Mary Kickbush by Cindy Mish, 1981.

In 1914, William H. Finton from San Francisco purchased both the Buhler and Myers homesteads. Finton had come to the North Fork in years previous to hunt and decided he would establish a dairy farm here. He, together with his wife and son, Charlie established the ranch on what was Myers' property in the SW-1/4, SE-1/4 of Section 5. The exact location of the original Buhler Homestead complex has not been determined, but Finton likely removed a number of Buhler's buildings to his new ranch headquarters. The dairy business apparently never panned out and the place became something of a dude ranch.[3] Charlie Finton was not well liked by his neighbors and the fact that he charged tourists for lunch at his place was resented by the other homesteaders who provided such gratis. When Charlie was caught hunting on Park land, the other homesteaders would not stand up for him, resulting in stricter enforcement of the no-hunting law thereafter[4]. When the McFarlands purchased the Finton Place in 1943, they found papers that indicated that the Fintons had been paid not to raise wheat on their ranch during the 1930's[5]. A few people on the North Fork had tried growing wheat in earlier years, but with little success. The Bank foreclosed on Charlie Finton in 1940.[6]

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[3] Mary McFarland, personal communication, Sept. 28, 1986.

[4] Interview with Ace Powell by Cindy Mish, July 15, 1976.

[5] Mary McFarland.

[6] Polebridge Ranger Station Log: December 6, 1940.

Chain of Title:

Charles Buhler: Final certificate 1912

William Finton: 1917

Federal Land Bank: 1942

John E. McFarland: 1943

John S. and Mary D. McFarland: 1947

United States of America: 1967

* * *

Historic Name: MARK MYERS HOMESTEAD
HR-13

Location: T35N; R21W; SW 1/4, NW 1/4, SW 1/4, Section 4.

Ownership: National Park Service

Access: The site of the Myers Homestead is marked by the developed spring on the small bench that runs generally North-South in Big Prairie. The building site is atop the bench approximately 600' directly East from a point on Glacier Route #7 approximately 1/4 mile north of the jog in the road at the end of the landing strip.

Evaluation of Significance and Architectural Integrity: The Myers Homestead appears to have been intentionally destroyed as all that remains are deep ground depressions banked by mounded dirt, a developed spring, and a trash dump in the woods to the

east. The site does not meet the criteria for listing in the National Register of Historic Places.

Historical Information: Mark Myers, an Iowan, came to the North Fork from Wyoming, where his family owned a coal mine. He married Ida Cruger in 1902 and together with their daughter, established residency on their homestead in Big Prairie in the summer of 1907[1]. Unlike the vast majority of North Fork homesteaders Myers listed his occupation as "homesteader" on the 1910 census.[2]

Indeed the Myers' agricultural production exceeded the average. In 1913 he reported having raised 4 to 5 tons of cabbage, rutabagas and carrots for sale. He also had 30 acres in timothy and oats. The improvements on the Myers property in 1913 consisted of a three room log cabin (17' x 31') with a shake roof, a log stable (15' x 25'), a hay shed (24' x 64') with a capacity of 35 tons, and a root cellar (10' x 12')[3]. In addition to tending his garden Myers earned money by hauling supplies up the Canadian oil fields.[4]

Mrs. Myers owned the only piano in the North Fork. But because the Myers residence was too small to

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[1] Interview with Helen Myers by Cindy Mish, August 17, 1976.

[2] Thirteenth Census of the United States, Blackfeet National Forest Enumeration District.

[3] National Archives, Case file #397242, Testimony of Claimant.

[4] Interview with Helen Myers.

accommodate the 40-50 dancers who would arrive for the all-night winter parties, the fiddling Covey brothers were the musicians in consistent demand.[5]

In 1916, Myers traded his homestead with John Lewis, the owner of the Gaylord Hotel in Columbia Falls and the Glacier Hotel on Lake McDonald, for a hay ranch at Half Moon, near Columbia Falls. His plan was to raise hay to sell to the timbering crews for their horses. After World War I, however, the depression in the lumbering industry led to Myers' bankruptcy. For the next few years Myers worked as in itinerant laborer, hauling railroad ties in Coram, on to Kalispell, and finally settling in Whitefish.[6]

The homestead property was sold to William H. Finton, Charlie Finton's father, in 1917. The Fintons lived at the Myers homestead cabin for the first few years on the North Fork, and then built a larger log house at the west end of the claim closer to the river. The Fintons attempted to start up a dairy farm but with limited success due to the distance to market. All buildings at the original Myers homestead were either destroyed or removed by the time the McFarlands purchased the land in 1943.[7] The Finton place became the MC Quarter Circle dude ranch under the McFarland's ownership. All building and

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[5] Interview with Mary Kickbusch by Cindy Mish, 1981.

[6] Interview with Helen Myers.

[7] Mary McFarland, personal communication, September 28, 1986.

structures at the dude ranch were also removed or destroyed when the Park Service acquired the site in 1967.

Chain of Title:

Mark Myers: final certificate 1912

John E. Lewis: 1916

William H. Finton: 1917

Federal Land Bank: 1942

John E. McFarland: 1943

John S. and Mary D. McFarland: 1947

U.S. Government: 1967

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Historic Name: CHARLIE SCHOENBERGER HOMESTEAD I-124

Location: T35N; R21W; SW 1/4, NE 1/4, NE 1/4, SE 1/4, Sec. 8.

Acreage: Approximately 4 acres.

UTM Reference: 11/5409420/696540

Access: Private ownership. Located approximately 2-½ miles north of Polebridge Ranger Station on Glacier Route #7. Site visible on west side of road in Big Prairie.

Evaluation of Significance and Architectural Integrity: The Charlie Schoenberger Homestead is

significant for its strong historical associations with the homestead settlement of the North Fork, the development of social and community life, and for its association with an important early family. The property meets criteria A, B, and C for listing in the National Register of Historic Places. The first Schoenberger residence, a one story log cabin (no longer extant) served as the Kintla Post Office from 1914-1918, a place was where eastside and westside homesteaders met often to exchange news and visit. Socializing continued at the Schoenberger place when the new, two story log residence as completed in 1917 and became a popular spot for all-night community dances during the winters.

The existing homestead residence, built to replace the earlier one story cabin, is architecturally significant as an outstanding two story log building that exemplifies the fine craftsmanship and the use of locally prepared materials on the North Fork. Later modifications to the building include the construction of a porch across the east facade and of an overhead stoop over the southern entrance. These alterations, completed in the early 1950's, are of log construction, compatible in design, and do not seriously compromise the architectural integrity of the residence.

Historical Information: Charlie Schoenberger came west from Illinois in search of opportunity shortly after the turn of the century, hauling agricultural equipment with the intent to work as an itinerant thresher. When this enterprise did not prove as profitable as expected, he found work with John

Lewis at the Glacier Hotel or. Lake McDonald, as a laborer for the Great Northern Railroad and as a packer for the various oil and coal exploration ventures that were gaining enthusiasm about the North Fork's prospects[1]. Both the Great Northern and the Milwaukee St. Paul and Pacific Railroads were busily surveying routes for North Fork branch lines in 1908[2] and Charlie Schoenberger decided he would "get in on the ground floor" of the North Fork bonanza by establishing a homestead claim.[3]

Charlie, Mary and their daughter Carolyn established residency on their Big Prairie homestead in July 1909 and had their first log house completed by August of that year[4]. During that first winter of 1909-10, Mary was the only woman to live on the upper North Fork; her closest female neighbor was Mrs. Sullivan about 12 miles to the south on Camas Creek.[5] The following summer saw an influx of new families to Big Prairie, and, although much of the time was spent battling the encroaching 1910 fire, a permanent homesteading community was established.

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[1] Interview with Mary Kickbusch by Cindy Mish, 1981.

[2] Columbian, June 1908.

[3] Interview with Mary Kickbusch.

[4] National Archives, Case file #514401, Testimony of Claimant.

[5] Interview with Mary Kickbusch.

Charlie Schoenberger was the first of the Schoenberger clan to take up a homestead on the North Fork. His father Anton and brother Paul followed, claiming two homesteads on Indian Ridge at the southern end of Big Prairie. The family of Charlie's wife, Mary DeFord Schoenberger, also came up to the North Fork. Her father and brother took up claims on the west side of the river and her sister, Eva, married Chance Beebe, who homesteaded near Polebridge, was a prominent North Fork ranger and head of the Park and Forest Se. vice predator control program during the teens[6]. Mary's other sister, Jesse, married border agent William Roberts, and lived at the northern edge of the westside homesteading community.

In 1914 when the Schoenbergers provided final proof on their homestead, they declared having built a log one-story house (16' x 48'), a log barn (24' x 32') and a root cellar (10' x 12'). All of their 89.13 acre claim was enclosed with log snake fencing and they had 3 cows with 3 calves, 2-½ dozen chickens and one horse[7].

The Schoenberger place served as the unofficial post office for the North Fork since 1914, with approximately 80 families, receiving their mail there[8]. Bill Raftery, who ran a stage line from Belton north during the early years, would bring up the mail on

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[6] Interview with Eva Beebe by Cindy Mish, April 20, 1974 and April 3, 1975.

[7] Case file #514401.

[8] Interview with Mary Kickbusch.

his irregular runs[9]. When the Kintla Post Office was officially designated on January 12, 1916, Mary Schoenberger was named the postmistress and Theodore Christensen was awarded the first eight-year mail contract[10]. Charles built an addition on the front of their log residence to serve as the post office.

During the summer of 1916, Charles began construction of the present two story log residence, which he built entirely by himself.[11] This was not the custom on the North Fork. It took him almost two years to finish the job. The Kintla Post Office continued at its original location in the first residence until 1918 when Mary went to Seattle, where she gave birth to her second daughter, Bernice. Before leaving, Mary arranged for the Kintla Post Office to be transferred to her neighbor Harriet Walsh.

With the large new house completed, the Schoenberger place became a focal point in the social life of the North Fork community. During the winter months large dances were held there, with as many as 50 North Forkers attending.[12] Jesse Bemis and the Covey brothers supplied the music, Ernest Henthorn the homemade rhubarb wine. Supper would be served at midnight and the dancing would continue through

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[9] Interview with Ben Hensen, Jr. by Cindy Mish, July 22, 1976.

[10] Microfilmed Postal Records, Montana Historical Society.

[11] Interview with Eva Beebe.

[12] Columbian, February 16, 1922.

the night. After breakfast was served at daybreak, the party would disperse[13]. These all night dances became a regular entertainment and were a practical solution to the difficulty of traveling at night during the winter months.

Like all North Fork homesteaders, Charlie Schoenberger did not make his living solely off the land. In May 1910 he listed his occupation as "trapper and hunter" on the 13th U.S. Census. The Act establishing Glacier National Park was, passed that same month, and trapping and hunting on Park lands was soon prohibited. Charlie picked up temporary summer jobs with both the Forest Service and the Park as a trail foreman and on road construction crews. He worked for a time for I.N. Daily at the Cabin Creek coal field across the border in Canada, built cabins for neighboring homesteaders,[14] and took on various logging contracts to make ends meet. In 1928, the family left to work for the Glacier Hotel on Lake McDonald and stayed through the change in hotel ownership. Charles then got work with the Montana Department of Highways and Mary cooked for the construction crews during the 1930's. They would return to the North Fork occasionally to visit their daughter Carolyn and son-in-law who were living on the homestead, running a cattle ranch.[15]

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[13] Interview with Eva Beebe.

[14] Columbian, April 13, 1922.

[15] Interview with Mary Kickbusch.

During the 1940's, Charles returned to live on the homestead property.[16] Mary Schoenberger took off with the late North Fork arrival, John Kickbusch, and lived in Washington State for the remainder of her life.

Chain of Title:

Charles Schoenberger: final certificate 1914

Claude and Carolyn Jordan: 1962

Jean Gould: 1966

William and William F. Cusick: 1966

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[16] Mary McFarland, personal communication, Sept. 28, 1986.

UNITED STATES GOVERNMENT
MEMORANDUM

DATE: 23 September, 1998

REPLY TO: Scott Emmerich

SUBJECT: McFarland Property Dispute

TO: Charlie Logan

I want to update you on what has developed concerning the Big Prairie MC Ranch property dispute between Jack McFarland and his sister Melanie.

First, some background information. I've spoken to Jack (John J. McFarland) and his wife Stephanie on at least three occasions about the property dispute since they were served court papers by Jack's sister Melanie in late August. I've known Jack and Stephanie since 1991. To my recollection, in the seven years I've been the North Fork Subdistrict Ranger, I've never had occasion to meet Melanie. Jack lives in Colorado for most of the year. Melanie was recently married to a gentleman from Sweden and they currently live in Japan where she works as a flight attendant for a major airline. Jack and Melanie purchased the 2.75 acre parcel in Big Prairie from their grandmother Mary McFarland in 1983. To my knowledge the property is in joint ownership with each party owning fifty percent of the assets. The original buildings on the property in question are of a pre-fabricated nature and were hastily constructed in 1968 by Mary McFarland after Glacier National Park purchased the McFarland's MC Ranch in the Big Prairie area of the North Fork Subdistrict. I believe

Mary had purchased this small parcel of land, which is adjacent to the MC Ranch, from her lawyer. The sale of the MC Ranch property also took place in 1968 and was a forced sale (i.e., the McFarland's were opposed to it) referred to as a *Declaration of Taking* due to a controversial land development plan the McFarland's (led by Mary's son David) were pursuing. According to the parks position in the legal dispute, the development plan posed a threat to the natural and cultural resources of the Big Prairie area. The development plan was determined by the Courts to be detrimental to the welfare of public property managed as Glacier National Park and the McFarlands were given a sum of money based on the federal government appraised value for the property. The manner in which the "taking" came about has left an emotional scar with the McFarland family to this date.

Jack has communicated his intentions to replace the existing structures on the property for at least the past five years. I have tried to pass on information to the Superintendent through the chain of command as new information developed over time. The existing cabins have fallen into disrepair and have never blended well with the rustic, cultural values emphasized by the park in its management of the North Fork Subdistrict. I've told Jack that, from my perspective, the park would be in favor of his replacing existing structures with similar-sized structures that blended more with the rustic nature of the area. His intentions have been to build log structures to replace

the existing buildings. From all conversations we've had over the years, his sincerity in wanting to blend a rustic looking ranch with the natural resources of the Big Prairie area seems genuine. It was assumed that he and his sister were in communication and agreement with plans for their property. Jack was mailed a copy of the parks Land Protection Plan with a cover letter signed by the superintendent in August of 1993.

Jack has been very open with me about his present plans to build new, then demolish old, structures in an effort to replace all buildings on the property. The initial construction on their property of a new "replacement" building came about rather quickly in early July 1997. A contractor friend and Jack started small talk about what Jack hoped to do and this quickly steam-rolled into moving and re-building an old log structure Stephanie's father built near Ford Creek in the Flathead National Forest onto the McFarland property and refurbishing it as a guest cabin. The exterior of the cabin was finished by Fall of '97 and the interior continues to be worked on. The size of the cabin is roughly the same size as the original guest cabin structure built by Mary. It was built adjacent to the existing older structure that Jack had promised to remove by the Fall of '98. In casual conversation with Jack shortly after construction began in the summer of '97, I asked if he and Melanie were sharing equally in all costs associated with construction of the replacement buildings. Jack stated that the property remained a family investment but he would be shouldering the financial

burden of replacing the structures. He and his sister, however, would continue to both sign as co-owners on construction loans for new structures on the property. Again, I assumed that the two partners were in agreement as to what was progressing with their joint ownership of the property.

Jack's next step involved replacing the generator shed, garage and a variety of old sheds and outbuildings that had been on the property, with a small barn for horses, tractor storage, the generator and a work bench. Without being able to be on site for any part of the construction, Jack authorized a local builder to construct a two story 36'x24' garage with an apartment on the second floor. The resulting structure is large by Big Prairie standards and stands out noticeably from all angles – including the Wild and Scenic River corridor. I believe Jack and Stephanie were caught by surprise and genuinely embarrassed by the size of the building when they first saw it this Spring. They worked to figure out ways to make it "fit in" and appeared to struggle with the realization of the size of the structure they had built. To make it blend with the local resources they've capped it with a dark green roof, accented it with log work, and stained it brown. At present, it stands out in stark contrast to the existing '60s-style architecture of Mary's original house and guest house. It appears to have potential to blend with other log construction buildings. The current montage of buildings, however, is very distracting to the visual resources present in

the Big Prairie and will likely not be acceptable by the park for anything long term.

Melanie's law suit requests that all construction and demolition immediately cease on the property. From reading the park's copy of the papers served Jack, Melanie wishes to keep the existing buildings and separate the 2.75 acres owned jointly by she and her brother. She appears to have great sentimental attachment to the original existing structures that she considers priceless. Meeting with Jack a few days after he had been served the legal papers, he appeared to still be in shock that the legal action was taking place and in great fear for what was developing between he and his only surviving blood relative (other than his uncle George). I have informed Jack that the park would be opposed to the division of the 2.75 acre parcel due to the unsightly montage of buildings in place and the inconsistency with the layout of the cultural setting of homesteads in Big Prairie. A number of the same issues that led to the "taking" of the MC Ranch in the '60s would come to a head again with the division of the small parcel of land jointly owned by the grandchildren of Mary McFarland. I have also informed Jack that the park would prefer to stay out of the legal fight between he and his sister. If the park does become involved it will be to protect the resources of Glacier National Park for the American public at the expense of one family with irreconcilable differences. I emphasized to Jack that I was making no threats of court action by Glacier National Park. I was only expressing options

that are now being openly discussed should this dispute continue to evolve. Jack understands the importance we place on being good neighbors, but is also very aware that the park is absolutely not afraid to enter into any dispute that threatens the park's natural, cultural or visual resources.

All agreements on property development to date between Jack McFarland and Glacier National Park have been made verbally and in good faith. In light of the legal action taking place between the McFarland siblings, I have asked Jack to submit written plans for any future construction to the superintendent for approval. If given the opportunity, I will ask Melanie to do the same. The court date for the hearing is October 14, 1998.

September 24, 1999

Mr. Steve Frye
Chief Ranger
Glacier National Park
West Glacier, MT 59936

Dear Mr. Frye,

It was a pleasure to meet with you, Charlie Logan and Scott Emmerich to discuss the development on our property in the North Fork Sub-District. As you know, we have been in the process of improving and cleaning up the property for a number of years. We have made significant progress although much work remains to be completed. In our meeting I committed to summarizing and setting forth in writing the details of the development plan and schedule we discussed.

Attached is a site plan (scale 1"=25') [McFarland Ranch site plan omitted in printing] which shows the approximate relative locations of the primary structures in question. Your representative Richard was here this week to take GPS readings of the buildings so you may already have this information. Below is a brief description of each structure.

1. Guest Cabin

This cabin is a log structure, approximately 20x30 with a covered porch on the north side. It was originally the carriage house at the Adair store at Polebridge, build in approximately 1917. The cabin has been stained brown and has a Hunter Green metal roof.

2. Garage

The garage is a 24x36 two story framed structure with board and batten siding and a Hunter Green metal roof. It has a covered porch on the north side as well as a covered deck on the east side which is of log construction. A small deck and staircase are under construction on the west side. The siding has been stained brown. As you are aware, we have completed the demolition and removal of the old garage after being delayed from our original commitment of last summer.

3. Generator Shed

This structure is under construction and the old shed has been demolished. When complete, the new shed will be an 8x12 framed structure with a Hunter Green metal roof. It will be stained brown. Its siding will be board/batten.

4. Propane Tanks

You inquired as to the feasibility of burying our propane tanks. While we were doubtful about this approach, we were able to find a vendor and secure the purchase and installation of underground tanks. The installation was recently completed and the old tanks removed. Accordingly, the tanks are now no longer visible from the road or the river.

5. House

We have committed, as part of our agreement, to replace the house with a log structure. This project

was originally scheduled for the summer of 1999 but was delayed as we have discussed. We intend to complete this part of our agreement as soon as practical and currently plan to begin the process next summer. The existing structure and footprint (40x40) will be removed and the new house built over the same site. We have agreed to provide final blueprints to the NPS for review prior to commencing construction. The final design will be based on the following:

- Foundation footprint of approximately 32x42, story and a half structure with a maximum roof height of 30 ft so as to be no higher than the garage.
- Log construction, stained brown with a Hunter Green Metal roof to match the other structures.
- Historical/rustic look and feel.

6. Septic System

As we discussed, the county approved our existing septic system and we will forward copies of the stamped drawings when we locate them. However, we recognize that the design of the existing system is not in keeping with new approaches to septic system design and construction. Based on concerns we share with the NPS about protecting the environment, we have committed to replacing the exiting outdated septic system with a system of modern design meeting approved codes of Flathead County. Our willingness to do so is predicated on our ability to obtain the appropriate approvals from the county for a new

system that will serve our needs. Our current plan is to complete the new system in conjunction with the replacement of the house. The location of the septic system is tentatively scheduled as shown on the site plan but is subject to change in order to meet requirements.

7. Landscaping

We plan to landscape the property in order to allow the existing and future structures to blend in with the prairie and surrounding terrain. As we discussed, we will work with you to provide for additional screening from the river as necessary. At the present time, we plan to undertake this work sometime next summer in conjunction with finalizing the plans to replace the existing house and septic system. We are currently in the process of installing a new driveway on the south side that comes into the garage entrance. We plan to abandon the existing driveway once the new driveway and other structures are complete. There is a large amount of construction debris which we intend to remove soon and a large burn pile which we will take care of after the snow falls.

We appreciate the close working relationship we enjoy with you and the other members of the Glacier Park management team. Prior to this time our communication regarding plans, approvals and progress have mostly been through verbal conversations but we agree with you that it is appropriate to also document our understanding in writing. This should help

to avoid any miscommunications and misunderstandings in the future. I will keep you posted on our progress. I look forward to working with you more closely as we move forward.

Sincerely,

/s/ J McFarland
Jack McFarland

Cc: Steve Berg/Angela Vaninetti